

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED VERDE COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOE JABER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the District of Arizona.

FILED

NOV 10 1933

F. D. MONTGOMERY

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Names and Addresses of Attorneys of Record.

Messrs. ANDERSON, GALE & NILSSON, Prescott, Arizona,

Attorneys for Plaintiff in Error.

THOMAS P. WALTON, Esquire, Phoenix, Arizona,

Attorney for Defendant in Error.

In the District Court of the United States in and for the District of Arizona.

No. L. 128—PRESCOTT.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Demurrer and Answer.

Comes now the above-named defendant by its attorneys and not waiving any of its defenses hereinbefore interposed, for answer to the complaint on file herein demurs to said complaint upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the same does not state facts sufficient to constitute a cause of action against this defendant under the Employer's Liability Act of the State of Arizona, under which act said complaint appears to have been filed.

III.

That said complaint does not set out facts that will support or authorize the recovery of compensatory damages for the alleged injury therein complained of.

IV.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of did not result from any accident contemplated by the said Employer's [1*] Liability Act.

V.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of were not sustained in and did not arise out of or in the course of the employment of the said plaintiff in the service of the defendant.

VI.

That it does not appear from said complaint that the said alleged injuries were not due to a condition or conditions of the employment or occupation of the said plaintiff.

VII.

That it appears from said complaint that the injuries complained of were not attributable to any

*Page-number appearing at foot of page of original certified Transcript of Record.

hazard or risk or any hazards or risks which were inherent in the occupation or employment of said plaintiff.

VIII.

That it does not appear from said complaint that the alleged accident and injuries resulting therefrom, if any such resulted, were due to the risk and hazard or risks or hazards which are inherent in a hazardous occupation as defined by said Employer's Liability Act and which were unavoidable by the said plaintiff while engaged in said hazardous occupation or employment within the terms and meaning of said Employer's Liability Act.

IX.

That it appears upon the face of said complaint that the injuries complained of were caused by the negligence of said plaintiff.

X.

That it appears from said complaint that the plaintiff has no right of action against the defendant for the injuries complained of. [2]

XI.

That it appears from said complaint that the accident complained of and the injuries resulting therefrom, if any such there were, were not due to an inherent risk or hazard of said plaintiff's employment but that the same resulted from conditions and causes that were well known to the said plaintiff and that he assumed the risk and hazard of injury therefrom.

XII.

That it appears from said complaint that the accident complained of and the injuries resulting therefrom, if any such there were, was not due to an inherent risk or hazard of the said plaintiff's employment but that the same resulted from conditions and causes that were well known to him and that he could have avoided the same and resultant injuries therefrom, if any such there were, by the exercise of that degree of care and caution required of him by the terms of said Employer's Liability Act.

XIII.

That it appears that said complaint does not state facts permitting the recovery under the terms and conditions of the Employer's Liability Act of Arizona or any Amendment thereof in this, to wit:

That it does not show that said injuries complained of, if any such there were, were due because of risks and hazards or a risk and hazard which are inherent in the hazardous occupation set forth in said Act and which are unavoidable by the workman therein and further that it fails to show that the injuries complained of were caused in the course of work at manual and mechanical labor or manual or mechanical labor in any of the employments or occupations enumerated in said Employer's [3] Liability Act by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment and further that it fails to show that the

said injuries complained of were not caused by the negligence of said plaintiff.

XIV.

That said complaint shows that said injuries complained of were not due solely to an accident arising in the course of the employment of the said plaintiff and said injuries were not due solely to the inherent conditions, risks and hazards of his said employment and occupation.

XV.

That said complaint shows that plaintiff is claiming damages far greater and different than the damages recoverable under the said Employer's Liability Act.

XVI

That it appears upon the face of said complaint that said action is based upon the Employer's Liability Act of the State of Arizona and that the said Employer's Liability Act is unconstitutional and void and in violation of Sections 5 and 7 of Article 18 of the Constitution of the State of Arizona in that it, upon its face, prevents the defenses of contributory negligence and assumption of risk from being submitted as questions of fact at all times to the jury and in that it deprived the defendant of the defense of contributory negligence and in that it attempts to deprive the defendant of the defense that the injured workman has assumed the risk.

WHEREFORE defendant prays judgment as to the sufficiency of said complaint and for its costs.

ANDERSON, GALE & NILSSON,

Attorneys for Defendant. [4]

ANSWER.

Comes now the defendant above named and not waiving any defenses hereinbefore interposed, for further answer to said complaint says:

I.

Denies each and every, all and singular the allegations of said complaint except such as are herein expressly admitted.

II.

Denies that by reason of any of the matters and things set out in plaintiff's said complaint that said plaintiff has been damaged in the sum alleged in said complaint or in any other sum whatever.

III.

Denies that plaintiff was engaged in manual and mechanical labor or manual or mechanical labor in any employment or occupation declared to be hazardous by the Employer's Liability Act of Arizona at the time he sustained the alleged injuries complained of.

Denies that such injuries, if any such there were, were due to an accident.

Denies that such injuries, if any such there were, arose out of or in the course of the labor and employment of the said plaintiff in any such hazardous occupation.

Denies that said injuries, if any, were due to a condition or conditions of the occupation or employment of plaintiff at the time he received such alleged injuries.

Denies that said injuries, if any, were due to any risk or hazard or risks or hazards inherent in the

occupation or employment in which the said plaintiff was then engaged. [5]

IV.

Defendant alleges the fact to be that the injuries sustained by plaintiff, if any such there were, were caused by the negligence, carelessness, fault and improper conduct of said plaintiff and would not have occurred but for his negligence, carelessness, fault and improper conduct and that the said plaintiff's carelessness, negligence, fault and improper conduct was the proximate and direct cause of his said injuries, if any such there were.

V.

Defendant alleges the facts to be that the injuries sustained by plaintiff, if any such there were, were caused by the violation by him of the orders, rules, regulations and instructions promulgated by the defendant for the safety of said plaintiff and his coemployees and for the protection of its property and he had full and complete knowledge and notice prior to his violation of the same of said orders, rules, regulations and instructions.

VI.

Defendant alleges that the accident resulting in the alleged injuries to plaintiff was not due to an inherent risk or hazard of his employment of occupation but that the same resulted from conditions and causes that were well known to him and that he assumed the risk and hazard of injury therefrom.

VII. .

Defendant denies that plaintiff is entitled to

recovery in its cause of action, any damages under and by virtue of the Arizona Employer's Liability Act or any Amendment thereof.

VIII.

Defendant denies that plaintiff has any right of action against the defendant for the alleged injuries complained [6] of. Defendant alleges that plaintiff has no right of action against the defendant for the alleged injuries complained of.

IX.

Defendant alleges that plaintiff in the course of work in any of the employments or occupations enumerated in said Employer's Liability Act received injuries by any accident arising out of and in the course of manual and mechanical or manual or mechanical labor, service and employment and due to a condition or conditions of such occupation or employment.

X.

Defendant denies that plaintiff, at the time of said injury so received by him, if any such there were, was in the exercise of due care and caution, but alleges the facts to be that said accident and resultant injuries, if any such there were, were caused by his negligence.

XI.

Defendant denies that plaintiff was injured by any inherent risk or hazard in his alleged occupation which was unavoidable by him.

XIII.

Defendant denies that plaintiff has suffered any pecuniary loss by reason of the matters and things

set forth in said complaint and denies that he has suffered any injuries that would sustain a verdict or judgment for compensatory damages or any damages against this defendant.

WHEREFORE defendant prays judgment that plaintiff take nothing by said complaint and for its costs.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128—Pret. Demurrer and Answer. Filed Nov. 10, 1922. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [7]

Regular April Term, 1923—At Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of May 17, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—May 17, 1923—Order Overruling
Demurrer, etc.**

The defendant's motion to make more definite and certain, motion to elect, motion to strike, and demurrer are now heard, and the Court being fully advised,—

IT IS ORDERED that the defendant's motion to make more definite and certain as to disability and sickness, etc., be and the same hereby is granted.

IT IS FURTHER ORDERED that the defendant's motion to elect herein be and the same hereby is denied.

IT IS FURTHER ORDERED that the motion to strike in Paragraph III of the Complaint, line 7 on page 2, the words "Without warning to this plaintiff," be and the same is hereby granted.

AND IT IS FURTHER ORDERED that the defendant's demurrer herein be and the same hereby is overruled. [8]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Amended Complaint.

Comes now the plaintiff and for amended complaint against the defendant says:

I.

That plaintiff is now and was during all of the times herein mentioned a resident of Yavapai County, Arizona, and defendant is now and was during all of the times herein mentioned a corporation owning property and engaged in the transaction of business and doing business in the County of Yavapai, Arizona.

II.

That defendant owns mines and mining properties, and operates said mines and mining properties in said County of Yavapai, State of Arizona, and that in the operation of said mines and mining properties the defendant has various and sundry underground workings for the mining development and extraction of ores from underground in its said mines and mining properties; and in the extraction and removal of said ores from said mines and mining properties defendant makes use of and uses dynamite powder and other high explosives for the breaking and pulverizing of ores and other substances in said mines; and that in the mining development, breaking and removal [9] of said ores from its mines and mining properties the defendant employs a large number of men for various and sundry duties and work in its said mines, underground and about its said workings.

III.

That heretofore, to wit, June 27, 1922, plaintiff was in the employ of defendant in defendant's said mine at and near Jerome, Yavapai County, Arizona, and was then and there working underground at the 1000-foot level in said mine, and was then and there employed and working as a mucker; and plaintiff was then and there, while in the employ of the defendant as aforesaid, working in the line of his employment and in pursuance of his duties, whereupon a heavy and violent blast of powder, dynamite or other explosive was set off in near proximity to this plaintiff, which blast was intense, loud, and carried great shock and violence, and as a result of said blast, shock, and the violence and intensity thereof, plaintiff suffered great physical pain and injury to the nerves in and about his left ear and head, and has continued and does now suffer great physical pain in and about said ear and head, and as a result of said injury and said shock caused as aforesaid the nerves in and about said left ear were injured and deadened so that plaintiff has lost the sense of hearing in said left ear, and by reason of said injuries resulting as aforesaid plaintiff has suffered great mental pain and anguish and will not recover, and said injuries, losses and disabilities are permanent in their nature. Plaintiff further alleges that by reason of said blast he suffered great nervous shock and his nerves and nervous system have been shattered, deranged and enfeebled, and from all of the aforesaid injuries, pain and suffering hereinbefore al-

leged and the losses resulting therefrom alleged, plaintiff has been damaged in the sum of \$10,000.00.
[10]

IV.

That the injuries herein set forth were caused by an accident, which accident was due to a condition or conditions of the occupation of plaintiff in the service of the defendant in a hazardous occupation, and was not due to the negligence of the plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of ten thousand (\$10,000.00) dollars, and for costs.

THOMAS P. WALTON,

Attorney for Plaintiff.

[Endorsed]: No. L. 128 (Prescott). Amended Complaint. Filed May 19, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [11]

Regular March Term, 1923—At Prescott.

United States District Court in and for the District
of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of June 27th, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Minutes of Court—June 27, 1923—Order for Physical Examination of Plaintiff.

Thomas P. Walton, Esquire, is present on behalf of the plaintiff. LeRoy Anderson and Alfred H. Gale, Esquires, of Anderson, Gale & Nilsson, are present for the defendant.

The defendant, by its counsel, now makes request to the Court that a physical examination of the plaintiff in this case be made before trial.

IT IS THEREFORE ORDERED that Dr. Robert C. Buck be and he is hereby appointed to make physical examination of the plaintiff, Joe Jaber, at least one day before the trial of this case; and that both parties may be present at such examination.
[12]

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of June 29th, 1923.)

L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—June 29, 1923—Trial.

This case comes on regularly for trial this date.

The plaintiff, Joe Jaber, is present in open court and with his counsel Thomas P. Walton, Esquire. The defendant, United Verde Copper Company, a corporation, is represented by its counsel, Messrs. Anderson, Gale & Nilsson.

Both sides announce their readiness for trial, whereupon a jury of twelve men is duly empaneled according to law and the rules and practice of this court, and by the Clerk duly sworn to well and truly try the issues in this case.

Thomas P. Walton, plaintiff's counsel, now reads the plaintiff's complaint to the jury.

Counsel for the defendant reads defendant's answer to the jury.

WHEREUPON IT IS ORDERED that further trial of this case be continued until June 30th, 1923. [13]

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of June 30th, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—June 30, 1923—Trial (Con-
tinued).**

Pursuant to order of adjournment of June 29th, 1923, this case comes on now for further trial.

The plaintiff, Joe Jaber, is present in open court and with his counsel, Thomas P. Walton, Esquire. The defendant, United Verde Copper Company, a corporation, is present by its counsel, Messrs. Anderson, Gale & Nilsson.

All members of the jury are present in their respective places in the jury-box.

On request of the defendant, D. A. Little is sworn as court reporter in this case.

The plaintiff, Joe Jaber, to maintain his case, takes the stand as a witness in his own behalf, and being first duly sworn, is examined.

At the plaintiff's request, Mike Kronich is duly sworn as Syrian interpreter.

The deposition of Dr. F. E. Reese is now read in evidence by plaintiff's counsel, Thos. P. Walton, whereupon the said deposition is admitted and filed in evidence and marked Plaintiff's Exhibit One.

AND PLAINTIFF RESTS.

The defendant now moves the Court for a directed verdict, which motion is by the Court DENIED.
[14]

(Minute Entry of June 30th, 1923—Continued.)

The defendant, to maintain its case, calls W. B. DeCamp as a witness in its behalf, who being first duly sworn, is examined.

Defendant's Exhibit marked No. One for identification is offered in evidence and is admitted and filed as Defendant's Exhibit No. One, being a diagram.

Defendant's Exhibit marked No. Two for identification is offered in evidence and is admitted and filed as Defendant's Exhibit No. Two, being a diagram.

Henry Williams, being first duly sworn, is examined.

Dr. D. C. Carlson, being first duly sworn, is examined.

WHEREUPON IT IS ORDERED that further trial of this case be continued until 9:30 o'clock A. M. July 2d, 1923. [15]

Expenditure No. 1
marked for identification
Expenditure No. One
Admitted and dated June 20, 1923
C. M. Hall, Clerk
Case No. 178 Prescott

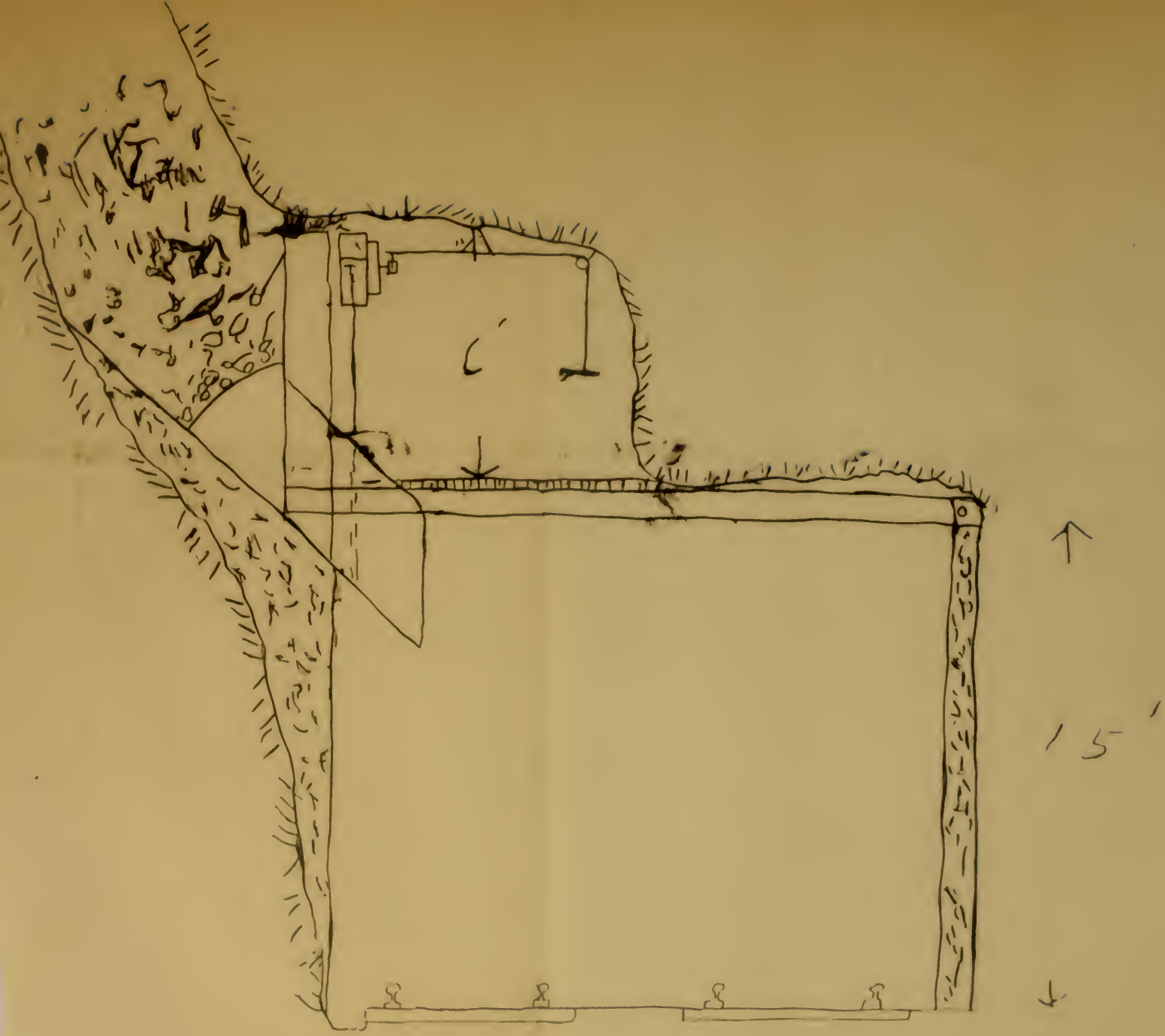
RAISE

RAISE



Plan Tunnel.

Defendant's Exhibit No. 1
marked for identification
Defendant's Exhibit No. 2
Admitted and filed June 30, 1923
CR 112-1111, Clerk
Case No. J 148-Monroe



Elevation Tunnel

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of July 2d, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Minutes of Court—July 2, 1923—Trial (Continued).

Further trial of this case is now had pursuant to order of continuance of June 30th, 1923.

The plaintiff, Joe Jaber, is present with his counsel Thos. P. Walton, Esquire. The defendant, United Verde Copper Company, is present by its attorneys Messrs. Anderson, Gale & Nilsson.

All members of the jury are present and in their respective places in the jury-box.

The defendant, to further maintain its issues in the case, calls Dr. C. R. K. Swetnam, as a witness, who, being first duly sworn, is examined. James Malcolm Walsch is called and, being first duly sworn, is examined.

Defendant's Exhibit No. Three is now admitted and filed in evidence, being the front side only of a hospital card of the United Verde Copper Company.

Dr. C. R. K. Swetnam is now recalled, and having been heretofore sworn, is further examined.

Defendant's Exhibit No. Four, a letter, is marked for identification only.

Dr. Robert C. Buck is called, and being first duly sworn, is examined. C. E. Young is sworn and examined. Robert F. Pate is sworn and examined.

WHEREUPON THE DEFENDANT RESTS.
[18]

(Minute Entry of July 2d, 1923—Continued).

L. 128—(PRESCOTT).

In rebuttal the plaintiff calls M. Fawhrez as a witness, who, being first duly sworn, is examined.

J. B. McNally is also called, and, being first duly sworn, is examined. W. B. DeCamp is recalled, and, having been heretofore sworn, is further examined. Mike Kronich is duly sworn and examined. Joe Jaber, plaintiff herein, is recalled, having been heretofore sworn, and is further examined.

BOTH SIDES REST.

WHEREUPON IT IS ORDERED that further trial be continued to 9:30 o'clock A. M. July 3d, 1923. [19]

Defendant's Exhibit No. 3.

UNITED VERDE COPPER COMPANY,
Hospital Department.

Form 240.

Name—JOS. JABER.

No. 365.

Working at MINE as MINER.

Date and nature of accident or sickness—6-26-22.

BACKACHE, DIZZY, COATED TONGUE.

Date and hour Hospital Dept. first notified—6-26
A. M.

Attended at Dispensary by Dr. WALSH.

Instructed to call—Daily.

Calls at Dispensary:

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Time	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	

In Hospital from ——— to ———.

Returned to work by Doctor ———.

Remarks — Off work.

6-28—albuminuria. Sent home to bed on milk diet.

(Stamped): Defendant's Exhibit No. 3. Admitted and filed July 2, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy. Case No. L. 128.

(THIS SIDE ONLY.) [20]

DEFENDANT'S EXHIBIT No. 3—Marked for Identification.

CALLS AT DISPENSARY:

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	

REMARKS:

7-20-22—Complains of deafness left ear which he said was caused by blast. This is first time he

has ever mentioned an injury. Examination of Drum shows there is no perforation. No serium plugs.

A. C. C. [21]

Defendant's Exhibit No. 4.

DEFENDANT'S EXHIBIT No. 4—Marked for Identification.

UNITED VERDE COPPER COMPANY.

In replying, Address
the Company.

Attention

MEDICAL DEPARTMENT.

Jerome, Arizona, August 2, 1922.

Dr. Swetnam,

Prescott, Arizona.

Dear Doctor:

We are sending you Mr. Joe Jaber for examination, for which the company will pay.

This boy came in for the first time on June 26. His complaint was dizziness. On the 28th we examined his urine and found abundant albumen. Few casts then but none now, but the albuminuria persists. We put him to bed on a milk diet in the hospital. He improved but in a day or two developed roaring and deafness in the left ear. I thot the symptoms were probably to localized nephritic oedema. They have persisted however and grown worse.

At the time of entrance he gave no history of injury. However after a few days he began to insist that his trouble started four days after he had

been near a small shot in the mine. We were not able to learn the certainty of this shot. Shooting of any consequence is not done on shift. There was no external evidence of injury to the drum that I could see. However, recently he has developed some redness around the upper margin of the drum. His blood Wasserman was negative.

Mental-nervous tests were negative except poor heel to toe walking, going down steps, slight, but distinct lateral nystagmus, quick to rt., and suggestion of von Graefe.

We do not see any reason to suspect injury as the cause of this illness. Will you please advise us by letter your findings in the matter, and call me by telephone as to what treatment he should have. If it is possible we prefer to have him come back here and we will carry out your orders.

Yours very truly,
JAMES THOM, M. D.,
Asst. Surg.

P. S.—If you think there is not reason to suspect injury as the cause of this sickness, he may go to Phoenix or anywhere he wishes. He has \$25 for stage fare and examination. If this will not be sufficient, inform me.—T. [22]

DEFENDANT'S EXHIBIT No. 4—Marked for
Identification.

C. R. K. SWETNAM, M. D.

Masonic Temple,
Prescott, Arizona.

Aug. 5, 1922.

Dr. James Thom,
U. V. Hospital,
Jerome, Arizona.

Dear Doctor:—

I have examined thoroughly Mr. Joe Jaber, whom you sent me on Aug. 3rd. I find absolutely no evidence of any injury or external violence to the ear or head. However, he has a definite neuritis of the 8th nerve, which on the left side amounts to practically complete loss of function for both the auditory and vestibular branches. On the right side there is a very slight affection which is shown only by reduction of bone conduction of sound. He seems to have some irritation along the base of the brain, judging by the symptoms of which he complains. This condition of the ears is certainly toxic, but I cannot say definitely from where it comes. He has some pus in the tonsils and he has some cough, which makes me suspicious of a chest condition, but it is possible for it all to be produced by the kidney condition.

His mental condition is not the best, and he feels positive in his own mind that all of his trouble started from the noise of the blast in the mine. I have told him that such was not the case, and that

absolutely all of his trouble comes from within. I have advised him to come back to you and ask you to take care of him, as it is going to take considerable time for the condition to clear up. The treatment is general care, rest and a searching for any point of infection. He also speaks somewhat of self destruction, should he not get [23]

C. R. K. SWETNAM, M. D.

Masonic Temple,
Prescott, Arizona.

Aug. 5, 1922.

better pretty soon.

He offered to pay me for *me for* his examination out of the \$25.00, but I told him to use that for board bill and stage fare, for I am afraid he is doomed to quite a long wait before being able to work again.

Hoping this examination will be of some benefit to you, and if I can be of further service, call on me.

Yours very truly,
C. R. K. SWETNAM.

CRKS:OH. [24]

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of July 3d, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—July 3, 1923—Trial (Con-
tinued).**

All parties and their respective counsel are present pursuant to order of continuance from July 2d, 1923, and all members of the jury being present in the jury-box, further trial is resumed.

The Court duly charges the jury, arguments are had by respective counsel to the jury, and the jury retires in charge of their bailiff, an officer of this court first duly sworn for that purpose, to consider of their verdict. Subsequently, at 9:20 P. M. after due deliberation, the jury returns into court in a body, all members being present, and report that they have agreed upon a verdict, and thereupon, through their foreman, present the following ver-

dict, Attorney Thos. P. Walton being present for the plaintiff, and A. H. Gale, Esq., being present for the defendant.

L. 128—(PRESCOTT).

“JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the Plaintiff, and assess his damages at \$1000.00 Dollars, One Thousand Dollars.

CHAS. P. SHERMAN,
Foreman.”

WHEREUPON the Jury is discharged. [25]

COPY.

L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

Against

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the Plaintiff, and assess his damages at \$1000.00 Dollars, One Thousand Dollars.

CHAS. P. SHERMAN,

Foreman.

[Endorsed]: No. L. 128—(Prescott). United States District Court, District of Arizona. Joe Jaber, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Verdict. Filed July 3, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [26]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Judgment.

Now on this 3d day of July, A. D. 1923, the above-entitled cause having come on for trial to a jury, the plaintiff and defendant having submitted their

testimony, respectively, to said jury, the Court having charged said jury upon the questions of law involved, and counsel having argued said case to the jury and the jury having retired to consider their verdict, and having returned a verdict for plaintiff in the sum of One Thousand Dollars (\$1,000.00);

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover of and from defendant the sum of One Thousand Dollars (\$1,000.00) and his costs incurred taxed and allowed at the sum of \$113.40.

Done in open court at Prescott, Arizona, on this, the 3d day of July, 1923.

F. C. JACOBS,

Judge of the United States District Court for the District of Arizona.

[Endorsed]: No. L. 128—(Prescott). Judgment. Filed July 7, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk.

Copy hereof received this 5th day of July, A. D. 1923.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant. [27]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Motion for New Trial.

Comes now the defendant above named and moves the Court for an order setting aside the verdict returned by the jury in the above-entitled cause and to grant to this defendant a new trial for the following causes materially affecting the substantial rights of this defendant.

I.

That the Court erred in overruling defendant's Demurrer to the complaint herein.

II.

That the Court erred in overruling defendant's motion for a directed verdict, made at the close of plaintiff's case and renewed at the close of all of the evidence.

III.

That the law, upon which said complaint and cause of action, is based, to wit: The Employer's Liability Law, of the State of Arizona, is unconstitutional and void, as being in violation of the

Fourteenth Amendment of the Constitution of the United States.

IV.

That the plaintiff failed to prove all of the material allegations of his complaint. [28]

V.

That the verdict is contrary to the law and the evidence.

VI.

That the evidence shows without conflict that the plaintiff was not injured while in the employ of the defendant, within the terms, conditions and provisions of the so-called "Employer's Liability Law" upon which this cause of action is based.

VII.

That the verdict is excessive.

VIII.

That the jury disregarded the instructions of the Court in arriving at its verdict, and that said verdict is not compensatory, as defined and set forth in the instructions of the Court.

IX.

Misconduct of the jury in arriving at their verdict.

X.

Error of the Court in refusing and admitting evidence.

XI.

Error of the Court in refusing instructions requested by defendant.

XII.

Error, particularly, of the Court, in refusing the following instruction requested by defendant:

“DEFENDANT’S REQUESTED INSTRUCTION
No. —.

The Court instructs the Jury that under the Employer’s Liability Law the Employer is liable to the Employee only when the injury is caused by an accident arising out of and in the course of the labor, services and employment of the employee and due to a condition or conditions of such occupation or employment and only when such injury shall not have been caused by the negligence of the employee injured. Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the [29] employment; unless you can say that the accident caused the sickness, and if you believe from the evidence in this cause that the alleged concussion did not cause plaintiff’s injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease.

I further charge you that even though you believe that the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by an injury received while in the employment of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that that accident caused his injury and the proof is not made

out by showing that he was suffering from some disease. You cannot and must not permit your sympathy for a man who has been sick nor diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases.”

XIII.

That the damages assessed by the jury are excessive and contrary to the law and the evidence.

XIV.

Misconduct of counsel for the plaintiff, during the course of the trial and during his closing argument to the jury; that such conduct was of such a character and nature that the same could not have been corrected by objection from the defendant and admonition and instruction by the Court to the jury; that said misconduct consisted of statements, insinuations and direct personal remarks, concerning counsel for defendant, and the witnesses, and physicians, sworn on behalf of defendant, and not based upon the evidence in the case; that said insinuations, as to the physicians for the defendant, were that they were hired, employed and under the control of the defendant corporation; that there was no evidence to that effect in the record, and none upon which any such inference could be made or based.

WHEREFORE, defendant prays that the verdict, as returned in this case, be set aside, and that a new trial be granted herein.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128. Motion for New Trial.
Filed July 13, 1923. C. R. McFall, Clerk. [30]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corpo-
ration,

Defendant.

**Order Extending Time Sixty Days to Prepare and
Tender Bill of Exceptions.**

Upon the motion of the defendant herein and good
cause therefore being shown:

IT IS ORDERED that the defendant be and it is
hereby granted sixty days from this date in which
to prepare and tender its bill of exceptions in this
case.

Done in open court this 20th day of July, 1923.

F. C. JACOBS,

Judge.

[Endorsed]: L. 128—(Prescott). Order Extend-
ing Time to Prepare and Tender Bill of Exceptions.
Filed July 20, 1923. C. R. McFall, Clerk. By Paul
Dickason, Chief Deputy Clerk. [31]

In the District Court of the United States in and
for the District of Arizona.

L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Order Fixing Amount of Supersedeas and Cost
Bond.**

Upon motion of defendant herein that the
amount of the supersedeas and cost bond be fixed
herein,—

IT IS ORDERED that such supersedeas and cost
bond be fixed at the sum of Fifteen Hundred
(\$1500.00) Dollars and defendant be allowed thirty
days in which to file said bond.

IT IS FURTHER ORDERED that no execution
shall issue pending the filing of said supersedeas
and cost bond.

Done in open court this 20th day of July, 1923.

F. C. JACOBS,

Judge.

[Endorsed]: No. L. 128. Order Fixing Amount
of Supersedeas and Cost Bond. Filed July 20,
1923. C. R. McFall, Clerk. By Paul Dickason,
Chief Deputy Clerk. [32]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, the United Verde Copper Company,
a corporation, of the State of Delaware, as prin-
cipal, and the American Surety Company of
New York, a corporation of the State of New York,
as surety, are held and firmly bound unto Joe
Jaber in the sum of \$1,500, to be paid to said Joe
Jaber, for the payment of which well and truly to
be made we bind ourselves, our successors, or as-
signs, jointly and severally, by these presents.

SEALED with our seals this 9th day of August,
A. D. 1923.

WHEREAS lately at a session of the District Court
of the United States, for the District of Arizona, in
a suit pending in said Court wherein Joe Jaber
was plaintiff and the United Verde Copper Com-
pany was defendant, judgment was rendered
against said defendant, United Verde Cop-
per Company, and the said United Verde Cop-

per Company is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the United States District Court as aforesaid.

NOW, THEREFORE, the condition of this obligation is such that if the above-named United Verde Copper Company shall prosecute said writ of error to effect, and answer all damages and [33] costs if it shall fail to make good its appeal, then this obligation shall be void; otherwise to be and remain in full force and effect.

UNITED VERDE COPPER COMPANY,

Principal.

By ROBERT E. TALLY,

Its General Manager.

AMERICAN SURETY COMPANY OF NEW
YORK,

Surety.

[Corporate Seal]

By GEORGE W. NILSSON,

Its Attorney in Fact.

Countersigned: FRED MOORE.

APPROVED by WM. H. SAWTELLE, Judge of the United States District Court, for the District of Arizona, this 25th day of August, 1923.

WM. H. SAWTELLE,

Judge.

[Endorsed]: No. L. 128. Supersedeas and Cost Bond. Filed Aug. 11, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [34]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Order Extending Time Thirty Days to File Bill of
Exceptions.**

Upon motion of the defendant herein, it appearing to the court that such extension of time is necessary, it is hereby ordered that the defendant shall have thirty (30) days from and after Sept. 18th, 1923, in addition to the extension already granted by this Court in which to perfect and tender its bill of exceptions herein.

F. C. JACOBS,

Judge.

[Endorsed]: No. L. 128. Order Extending Time.
Filed Sept. 10, 1923. C. R. McFall, Clerk. By
Paul Dickason, Chief Deputy Clerk. [35]

In the District Court of United States in and for
the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit,
on the 30th day of June, A. D. 1923, the above-en-
titled cause came on for trial at Prescott, Arizona,
upon the issues joined herein before the Hon. F. C.
Jacobs, United States District Judge for the Dis-
trict of Arizona, sitting in the City of Prescott,
Yavapai County, Arizona.

A jury was duly empaneled and sworn and there-
upon the parties respectively offered and intro-
duced the following evidence and exhibits of evi-
dence and offers of evidence and the following evi-
dence and offers of evidence were rejected and ob-
jections and motions were made and ruling of the
Court entered and exceptions duly taken by the
parties as follows, to wit:

APPEARANCES:

THOMAS P. WALTON, Esq., for the Plaintiff, and
Messrs. ANDERSON, GALE & NILSSON, for
the Defendant.

PLAINTIFF'S EVIDENCE IN CHIEF.

Page 2—Transcript of Evidence.

Testimony of Joe Jaber, on His Own Behalf.

JOE JABER, plaintiff, a witness on his own behalf, being duly sworn, testified as follows: [36]

My name is Joe Jaber, the plaintiff in this case. I was employed by the United Verde Copper Company at Jerome. About the 26th, 27th or 28th of June, 1922. I think I worked there about a month or thirty-two days. Before that I worked at Globe and at the Inspiration Mine at Miami.

Q. Did you ever happen to have any accident or injury before you worked for the United Verde Copper Company? A. Yes, sir.

Q. How is that?

A. No, sir. I have never been sick and don't remember being troubled with any disease. I am an Assyrian. I was working for the United Verde Copper Company on June 26th or 27th of last year. I had trouble with a blast while I was working on the 1000 foot level. I was working between the rail in the tunnel. The tunnel was probably 26 or 15 feet wide, I don't know exactly. I was working as a mucker, shoveling dirt and rock, cleaning the track so the motor train could pass. I was working with a fellow named William Shoemaker and an-

(Testimony of Joe Jaber.)

other fellow whose name was Joe Zanovich. I don't know where Joe Zanovich is now. I tried to locate him but I can't find him. These men were not close to me at the time of the accident. I can't tell exactly how far from me.

The blast went off. I had a headache and dizzy and ear drill. The blast was in the chute in the raise that is the hole that goes to the top. I was in the tunnel probably 35 or 40 feet from the raise when the blast went off. When the blast went off I had the headache and the ear drill and I fell down. I didn't hear anyone say that there was going [37] to be a blast. I fell down, become dizzy and it seemed to me that both ears drilled. By drill I mean a heavy noise in my ear. I was awfully sick when I fell down and dizzy when I stood up. I just sat down in that drift and called the two men. William Shoemaker come in, the other stayed outside. I said to Shoemaker, "Why didn't you say something if you want to blast? That shot hurt me." He said, "How did it hurt you?" I said, "Just an ear drill and headache." He said, "It must be that you got gas or something like that that make your head ache," and I said, "No, because I just felt it when you blast out of that chute." I told Mr. Shoemaker I could not do anything at the time and that I was going up. He said he didn't have time to go up with me then but would pretty soon. I went to a little office or station about 200 or 300 feet away where I washed my face and lay down on a bunk because I was dizzy and my

(Testimony of Joe Jaber.)

ear hurt and I had a heavy headache. I stayed there about an hour and a half and then I went up in the cage with the rest of the men and went in the cars that took us out to the change-room. I was still dizzy, had a headache and my ear was drilling. I went to the change-room and changed my clothes. I was not able to wash. I went down to the office in the same building to report I was hurt but I could find nobody there. After that I walked up to my room. It was about one o'clock at night when I got to my room. I couldn't sleep because my head ached and I was sick, my ear was drilling and I was dizzy.

Next morning I got up about nine o'clock and went up to see the doctor at the hospital. I saw Doctor Walsh. I told him all about it and he says, "Well, I see you are awfully dizzy all right and it must be that you ate something that poisoned you." I told him, "Doctor, no, I didn't think so [38] because when I feel it from the blast shot."

He got some medicine and said that maybe I ate something that poisoned my stomach or get some poisoned gas. Then he gave me some pills and said I would be all right.

He didn't put me in the hospital but told me I could go back to my room. I took two pills and then went back to work. I tried to work and I couldn't hardly work. I got sick again and dizzy and headache. Ear drill all the time. When I was underground I was worse sick. I saw I couldn't work so I call two fellows to call the cage for me

(Testimony of Joe Jaber.)

because I wanted to go back to my room. I didn't know who they were. They said they were new men on the work and didn't know how to call the cage. I then went to the office and laid down on the bench. I stayed down there until it was time to quit. Then I went up to the surface again and went back to my room. On the second day I went back to see the same doctor as before. I told him I was worse and he said he would examine me for kidney trouble. He took a sample of my urine. Then he said I had a little kidney trouble. I told him it came from the shot. He said, no it was a little kidney trouble. I told him it came from the shot. He said no, it was a little kidney trouble and he would give me some medicine for it. I told him I needed to stay in the hospital. He said, "No, you go back to your room, come back to-morrow and if you get any worse, I will put you in the hospital." I stayed in my room all that day and the next morning I came back and saw Doctor Tom. I told him all about the drilling in my ear. He took a look at my ear and said, "I see that the drum is red but it is not busted." He said for me to come back next day and he would take a picture of my head. The next day I came back and saw Doctor Tom again. He took a picture of my head and put me in [39] the hospital. I stayed there maybe fifteen or eighteen or twenty days. I asked him about the head picture and he said he couldn't see anything in the picture. While in the hospital I was dizzy, had a headache and the drilling in the

(Testimony of Joe Jaber.)

ear continued. He took a specimen of my urine again and said I had kidney trouble. I said it was not hurting me. He gave me some medicine and gave me some kind of drop in my ear at the same time. Every three or four days he took another specimen. Then he came and told me that my kidney is all right and everything. But I was just the same. My headache was a little better but I was dizzy and the noise in my ear. He told me that my kidney trouble was all well. He told me to go back to my room and he would come down and see me every day. Doctor Tom told me that Doctor Carlson told me to go home. I went back to my room because he made me. The doctor came down every other day down there. I told him I couldn't stand it and he said he would send me to Prescott. About three or four days afterwards, he sent me over to Prescott. He gave me \$25.00 and told me to go to Prescott to see Doctor Swetnam. I went to Prescott and saw Doctor Swetnam. He examined my ear with a wire. It made a little noise and I could hear in one ear and I couldn't hear in the other. He said he was going to see if I had any catarrh in my nose. He looked and said, "I never see any." Then he looked in my mouth and said, "I see some pus," and said probably there was some pus around my teeth. He put some medicine in my ear and after about five minutes he said, "That ear drum is busted. That is what I find." He said that the ear is busted and dead. I did not tell him anything about blast because the Doctor had

(Testimony of Joe Jaber.)

a letter from Doctor Tom. I told him about the blast after he asked me about it. [40]

I told him about the headache and the dizziness and the drilling that started in my ear immediately after the blast. He said that the ear nerve was busted. Drilling in my ear has continued since the time of the blast until now. The dizziness went away, just a noise continued. The dizziness lasted about four months. From the time of the blast I have not been able to hear in my left ear.

Cross-examination by Mr. ANDERSON.

Page 32—Transcript of Evidence.

Before going to Jerome, I worked at Globe and at the Inspiration in Miami. I have been a miner about a year. I was working with Mr. Shoemaker and another fellow named Joe Zanovich. The other fellow helped to load that train and sometimes he helped me when I needed it in mucking. This blast happened about the 26th, 27th, or 28th of June. I had been working in the mine about a month before that. I had not been working with Mr. Williams all of that time. Maybe ten or fifteen days. On the day that I was hurt, I was working on the 1,000 feet level with Mr. Williams loading muck into the cars. Mr. Williams was working at the chute. They were blasting in the raise to loosen the ore in the chute so it would run down. I don't know how much powder they used. I was not with him at the time. I was working down on the level. I am sure that Mr. Williams sitting there is the

(Testimony of Joe Jaber.)

man that was working with me. I hear everybody call him Shoemaker and that is what I call him. At the time the blast went off, I was down alongside the car putting muck into it. I was about thirty or thirty-five feet from the chute where the blast went off. I was hurt about 10:30 or 11:00 o'clock at night. I called Mr. Williams [41] or Mr. Shoemaker as I called him. I told him right away that I was hurt by the blast. I was feeling fine all the time up until then, no dizziness, no headache, no roaring in the ear before this time. The first day the doctor didn't examine me, just looked at my tongue and said I probably had eaten something that had poisoned my stomach and told me to take some medicine and go home. My stomach didn't feel badly but my head did and I felt sick. I went up to the United Verde Copper Company hospital next morning and saw Doctor Walsh. That morning he took a sample of my urine. He took my temperature and my pulse and looked at my eyes. He said he had no room at the hospital, for me to go home and come back next day. About the fourth or fifth day they put me in the hospital. When I was in the hospital he only give me milk to eat and put me to bed. He took specimens of my urine every five or six days. I can't tell how many days I was in the hospital the first time. Then they let me out of the hospital and told me to rest at my room. They didn't send me to Doctor Swetnam until about two months afterwards. I did not go to see the dentist at that time but later

(Testimony of Joe Jaber.)

on the hospital sent me to the dentist at Jerome. The dentist said my teeth were all right except they needed cleaning. He didn't say anything about the pus. Doctor Tom gave me \$25.00 and told me to go over to see Doctor Swetnam and told me he was a specialist on ear, nose and throat. Doctor Swetnam examined my head. Two or three days ago I was at Fort Whipple and was examined by Doctor Buck. Later on I came back to the United Verde hospital the second time. I can't tell just exactly how long I was there, six or seven weeks. They kept me on milk diet. When I was out of the hospital I had eaten anything I wanted to. The second time I was in the hospital [42] they did not test my urine. Doctor Snipes did not tell me that my teeth were loose and pus running from them. The dentist did not tell me that I had loose teeth, that the pus drained from them and wanted me to come back the next morning. My head does not ache and I am not dizzy now but my left ear drills. The other ear does not hurt at all. I have never had any teeth taken out since the time of the accident. After I saw Doctor Swetnam at Prescott, I returned to Jerome. After Doctor Swetnam had examined me, I went right back to the hospital at Jerome. I know Doctor Carlson was one of the doctors at the hospital but I didn't know whether he was the manager there or not. When I called for him, he came to see me.

(Testimony of Joe Jaber.)

Redirect Examination by Mr. WALTON.

Page 46—Transcript of Evidence.

I don't know how many times Doctor Carlson came to see me while I was in the hospital, maybe three or four times. I was put on a milk diet after I came back to the hospital again. When I left the hospital the first time Doctor Tom said I was well with kidney trouble. I was fighting with the Doctor every day because he made me awful hungry. Gave — three glasses of milk a day. I don't know how long they kept me on the milk diet. After two or three weeks, the Doctor said I could go to the table and eat whatever I wanted to. I lost a lot of weight.

There had been some other blasts before the one that made me fall down. Sometimes they blasted ten times, five times, six times. Sometimes they wouldn't need to blast at all. The other times when they blasted I would go down the tunnel a little way but then they would let me know. Someone [43] would say something so I could get away. At the time this blast went off, I was cleaning the muck out between the tracks. There was a car standing close to me. I cleaned muck off the ground between the tracks and put it in the car. I was standing between the chute and the car. I was standing between the two rails. I was probably thirty or thirty-five feet from the raise and about two feet maybe three or four from the car. I was working between two cars when the blast went off.

(Testimony of Joe Jaber.)

They put me on milk diet both times I was in the hospital.

Recross-examination by Mr. ANDERSON.

Page 53—Transcript of Evidence.

I eat what I wanted when I was out of the hospital. When I was in the hospital I didn't eat anything except milk.

Doctor Carlson came through the hospital every day. I finally left the hospital of my own accord because they put me on milk diet all the time and I am suffering just the same. I left because they did not treat me right there.

When I left the hospital I went right down to Phoenix.

When I entered the hospital I weighed 138 pounds. When I went to Phoenix I weighed 125 pounds. When I was in the hospital I weighed 117 pounds. Now I weigh 125 pounds or 126 pounds.

Redirect Examination by Mr. WALTON.

Page 57—Transcript of Evidence.

Before I left the hospital the doctor said he could do nothing for my ear but that my ear nerve would simply have to dry up by itself.

About ten days after the blast my neck was stiff. I couldn't twist it. [44]

Plaintiff's Exhibit No. 1.**Deposition of Doctor F. L. Reese, for Plaintiff.**

Page 58—Transcript of Evidence.

The deposition of DOCTOR F. L. REESE, a witness on behalf of the plaintiff was read. He testifies as follows:

Direct Examination by Mr. WALTON.

My name is Doctor F. L. Reese residing at Phoenix, Maricopa County, Arizona. I am a physician and a specialist of the eye, ear, nose and throat.

The qualifications of Doctor Reese were admitted by Mr. Gale for the defense.

I examined Joe Jaber, the first time on September 20, 1922. I was asked to examine his left ear. I examined it thoroughly. The object of finding was negative. By that I mean as far as I was able to see, there was nothing pathological. The drum of the ear was normal. I could not see the inner ear. There might be something wrong with the inner ear back of the drum and yet the drum would appear to be perfectly normal. The form of deafness in which there is no external findings is usually the result of shell shock, or an explosive, heavy explosion or concussion deafness in which there is an actual blow on the head. Any of these things may cause the same finding which is usually a hemorrhage in the inner ear leading to a form of nerve deafness. This would not cause any showing on the drum of the ear. There could be a deafening of the nerve brought about by a shock or blast.

(Deposition of Dr. F. L. Reese.)

The whole object of my examination was to determine to my own satisfaction whether or not the man was malingering. I would not make the statement whether he could hear or not but I came to the conclusion, judging from what I could find, that he [45] could not hear. Basing this simply upon the fact that I could not catch him by the tests which we ordinarily use in determining a malingerer. Sometimes it is easy to catch a malingerer but not always. A condition might be brought about in the inner ear from a heavy blast or shock which would produce deafness without a physical showing. Such a shock or blast might displace the bones of the inner ear. An injury such as I spoke of of the bones of the middle ear would interfere with the conduction of sounds to the nerves and would not be an injury to the nerve *per se*. I examined Mr. Jaber again about three days ago. The findings differed in no way from the first examination. I did not make any tests the last time to determine whether he was a malingerer or not. I found nothing to change the opinion which I formed at the first examination. Assuming that Mr. Jaber is deaf in his left ear from an injury such as I have described, there is no treatment which can relieve the condition. Usually there is no improvement of the hearing. Occasionally we have had a recurrence in later years of a slight amount of hearing, but in those cases it was always a question whether we had true concussion deafness or whether something else was the origin of it.

(Deposition of Dr. F. L. Reese.)

Cross-examination by Mr. GALE.

Page 65—Transcript of Evidence.

I have no ability to demonstrate that he had no hearing. The ear drum is subject to considerable variance but this ear drum could be classified in the line of normal. There were no perforations. There was no evidence of any traumatism or external blow upon the head or the ear or the drum. Deafness such as I have described could be the result of a toxic condition in the patient but of course we would have to take into consideration that he had an impairment in [46] only one ear. Such loss or impairment of hearing could be caused by nephritis. It could be caused by infected teeth or pus draining from the teeth. This is theoretical, however, as I have never seen a case of absolute deafness from such cause. It could be caused by scarlet fever. It is my opinion that the condition of his ear is due to concussion or possibly a condition that comes under the name of shell shock. If the blast caused the hemorrhage in the inner ear, deafness would result at the time of the injury or a comparatively short period thereafter. There could not be perfect hearing immediately after the injury and then this condition come on. If there was a hemorrhage, usually the destruction of the tissue results and we find that there isn't any great amount of recovery of nerve tissue. Any injury to an eighth nerve would occur at the time of the injury and not later. The deafness in this ear is nerve deafness. Nerve deafness may be caused by

(Deposition of Dr. F. L. Reese.)

a toxic condition. I cannot state whether there was any toxic condition in Mr. Jaber. I did not make any blood tests of him at all. I did not examine him except for the hearing in the left ear. His right ear looked normal and he did not complain of any impairment of hearing in the right ear. I could not state from my examination whether this man had nephritis. I looked in the man's throat just as routine as I always do and as there was nothing about his tonsils that caused me to stop to give them any particular consideration, I cannot say whether he had infected tonsils. I did not notice any pus about the teeth.

I am familiar with the general symptoms of nephritis. A condition of dizziness, etc., is one of the symptoms that goes with it. [47]

Redirect Examination by Mr. WALTON.

Page 71—Transcript of Evidence.

In my examination I did not observe any effect of nephritis. In case of loss of hearing due to infected teeth, it would be by the poisoning of the nerve tissues of the body with a special affinity for the nerve hearing. I did say that scarlet fever might cause loss of hearing. In such a case, however, it would come usually by infection of the middle ear which would leave unmistakable signs. Infected teeth or nephritis or general toxemia would not necessarily show any general findings in the ear. I said that this man might have had a hemorrhage of the inner ear. I found no evidence of a toxic

(Deposition of Dr. F. L. Reese.)

condition that I can recall. The toxic condition which would destroy the hearing would be liable to affect both ears.

Recross-examination by Mr. GALE.

Page 73—Transcript of Evidence.

I did not examine this man for nephritis nor did I pay much attention to any toxic condition. Such a condition might have existed and not come to my knowledge.

The deposition was then admitted as Plaintiff's Exhibit I.

Testimony of Joe Jaber, on His Own Behalf (Recalled).

JOE JABER, being recalled as a witness in his own behalf, testified as follows:

Redirect Examination by Mr. WALTON.

Page 74—Transcript of Evidence.

After I had been to Prescott to see Doctor Swetnam and returned to the hospital at Jerome, they took X-ray pictures of my head and my teeth and my chest and Doctor Tom took my neck picture. The doctor said he saw some kind of nerve in my neck. He said my ear looked like slip. I asked him what made my ear solid and he said probably from the nerve. [48] He said the teeth were all right, every one of them. He never said I had any pus around my teeth. He said my teeth were all right. He said my chest was all right.

(Testimony of Joe Jaber.)

Doctor Tom took a lot of blood and sent it off to have it tested. When it came back he said it was O. K. Mr. Farrag was present when he told me that. Nobody was present when he told me about the pictures. Mr. Farrag went with me the first time I went to the hospital. He came to see me sometimes every day. Sometimes every other day. The doctor at Prescott put medicine in my ear and spun me around on the stool a few times.

Mr. WALTON.—The plaintiff rests.

Page 77—Transcript of Evidence.

Whereupon the defendant, at the close of plaintiff's case, moved the Court for a directed verdict upon the following grounds:

“That there is no evidence proving or tending to prove any of the material allegations of the complaint; that there is no evidence tending to show that this action is within the terms and provisions of the so-called Arizona Employer's Liability Law; that there is a failure of proof to support the material allegations necessary to bring it within the terms of such a law in that there is no proof whatsoever of the relationship of master and servant or employer and employee and that the law under which this action is brought is unconstitutional, to wit, Paragraph 3159 of the same in that it undertakes to change the rule of the Constitution of the State of Arizona as to the question of contributory negligence and the assumption of risk,

(Testimony of Joe Jaber.)

being a question of fact to be submitted at all times as a defense to the jury.”

The motion of defendant was denied by the Court. Plaintiff's case was reopened.

Testimony of Joe Jaber, on His Own Behalf (Recalled).

JOE JABER, the plaintiff, was recalled as a witness on his own behalf.

Redirect Examination by Mr. WALTON.

Page 82—Transcript of Evidence.

I was paid \$4.00 a day for my work. I have not been able to work at all since I was injured. At the time I went to work for this company I was examined by Doctor Walsh. I [49] was undressed and they examined me all over. They examined my teeth, mouth, eyes, nose, chest, heart, liver, kidneys and all over. Ears and all over. My feet, legs, hands and he weighed me too. I weighed 138 pounds at that time. He did not say anything about any disease and gave me a slip to go to work and everything O. K. I have not worked in the mine since that time and I can never work in a mine any more because I am scared of it. I can't pass the doctor's examination any more for work.

Recross-examination by Mr. ANDERSON.

I have not tried to get any work since I was here. I worked a couple of days at Phoenix but couldn't stand it.

Mr. WALTON.—The plaintiff rests.

(Testimony of W. V. DeCamp.)

Thereupon the defendant renewed its motion for a directed verdict.

The motion of defendant was denied by the Court to which ruling of the Court, defendant, by counsel, then and there duly excepted. (Page 84 of the transcript.)

DEFENDANT'S EVIDENCE.

Page 84—Transcript of Evidence.

Testimony of W. V. DeCamp, for Defendant.

W. V. DeCAMP, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is W. V. DeCamp. I am a mining engineer employed as superintendent of the United Verde Copper Company at Jerome. I am familiar with the mine of the United Verde Copper Company and with the rules and regulations of that company. I have been connected with the company altogether five years but the last period of employment about three years [50] and two months. I am familiar with the 1,000 foot level and heard the testimony of Joe Jaber concerning it. I was employed in my present capacity at the mine on the 27th of June, 1922.

Thereupon a sketch was marked for identification, Exhibit 1 on the one side and Exhibit 2 on the other side, and the same was handed to Mr. DeCamp.

(Testimony of W. V. DeCamp.)

I made that sketch. It is an approximate plan of the tracks and the tunnel with the position of the raises and the 1,000 foot level. I am thoroughly familiar with it because I laid out this work in 1912 and had many occasions recently to relay rails and do other work in connection with it. Such work that my knowledge of the dimensions, etc., is exact because I am so familiar with this. It is a correct representation of the 1,000 foot level.

Questions on *Voir Dire* by Mr. WALTON.

This is a correct representation of the tunnel at the point where he was working near the No. 1 and No. 2 ore bins. This is the floor plan. The raises didn't come out as brought down by plaintiff's testimony. The tunnel is about 15 feet high and 22 feet wide. The ore chute begins to show about 15 feet above your head so the ore chute does not come down to the floor. It only comes to the top of the tunnel.

Direct Examination Continued by Mr. ANDERSON.

The other side of the sketch is a cross-section of the tunnel, being made through the tunnel and part of one of these raises, to show how the raises go up from the level.

Both sides of the paper, to wit, Exhibits 1 and 2, were thereupon offered in evidence.

Further questions on *Voir Dire* by Mr. WALTON.

I was in that tunnel on Monday morning of this week. I did not have this trial in mind when I was

(Testimony of W. V. DeCamp.)

in the tunnel. I [51] was going on my regular rounds in connection with my regular duties as Mine Superintendent. We have four chutes of that character on the 1,000 foot level. They are the termini of four raises which extend from the 1,000 foot level to the surface of the mine. They are constructed of steel and are the main transportation bins. They are all large capacity, holding about 1,100 to 1,200 tons apiece.

The place where this alleged accident occurred was close to No. 2 raise. The floor plan and the cross-section were made to give an idea of how this place looked.

Thereupon the two exhibits were admitted in evidence as Exhibits 1 and 2, page 90 of transcript.

The tunnel at that point is exactly 22 feet wide. Between the face of the concrete under the raise 23 to 24 to the opposite side. There is a set of double standard gauge tracks in front of each of these batteries of two raises. The tunnel narrows down then for a short distance and when you come to the next two raises, it widens to 22 feet. The elevation will vary between 9 and 15 feet. A minimum of 9 feet is necessary in order to get our trolleys up to a point where they are safe. The elevation is identical for all four raises in the mine. They were designed at the same time and the construction and steel work were all made at the same time and the ground was cut and they were installed at the same time.

(Testimony of W. V. DeCamp.)

The tunnel at the raise is actually 15 feet to the ceiling. The total length of the tunnel is a fraction over a mile and a half. I am familiar with the work Jaber was doing. He would be working on the floor of the tunnel loading into a car which they will spot occasionally at this point. The elevation at the point of the bins is 15 feet to the ceiling; [52] 12 feet to the bottom of the chute. There is an air controlled gate at the mouth of the chute to control the ore so that the cars did not become overloaded. Ore is loaded in the cars and they are taken out to the crushing plant at the mouth of the tunnel. There are 10 cars to a train and motormen are going back and forth in the tunnel all day.

This man's job was to clean up the spillage of ore resulting from the loading of the cars. When the ore is loaded from the chutes into the cars, some of it gets over the sides on to the track and to prevent derailment we keep one man on that job. It is a light job. Sometimes it is necessary to blast in the chutes because large rocks may arch at the point of discharge or the ore may be moist and so clog up the chute. If the ore cannot be started by barring it loose, it may become necessary to place a stick of powder up in the raise close to the rock that is lodged therein. Blasting may occur several times during a shift or it may not occur for a week. There is never any blasting in the tunnel. It is confined entirely to the raise.

This tunnel is wired for electricity a little better than the average building. All our wires are in

(Testimony of W. V. DeCamp.)

conduits on account of moisture. We use the ordinary lights. The blasting is never violent enough to destroy or jar the electric lights in the neighborhood of the raise.

In the event of an accident, the individual reports to the shift boss or some other boss, usually the shift boss or if the individual is so badly injured that he cannot report, the nearest man makes the report to the shift boss. This is the rule of the company which rule is posted about the mine. When the shift boss comes to the surface, he fills out a card especially prepared for the purpose with the name of the man, [53] his number and the nature and manner in which the accident occurred. This is left in the office of our Safety First Engineer. As soon as the Safety First Engineer comes to work, he looks over the cards placed in his office during the night and further investigates the particular case. Our records show that no record was made of an accident such as complained of here.

United Verde Copper Company maintains a hospital equipped with all modern equipment and in June of 1922, Doctor A. C. Carlson was Chief Surgeon; Doctor Walsh and Doctor Tom were his assistants and Doctor Rogers was an X-ray technician.

Cross-examination by Mr. WALTON.

Page 106—Transcript of Evidence.

The chute is like a trough, has a bottom and two sides but is not covered at the top and there is a

(Testimony of W. V. DeCamp.)

closed gate at the end. The gate would be closed when we are blasting. After leaving the vicinity of the raise, the ceiling of the tunnel slopes down to approximately 9 feet and then comes up to 15 feet against the next raise. If a man was 30 or 35 feet from the raise, he would be where the tunnel would be only about 9 feet in height.

If a blast is set off in the chute, it would travel in both directions from the raise but it would not become more dense because the vibration is going both ways as it left the central point. Therefore the velocity of sound or travel of the air movement or wave movement would be very much lighter than it was up in this little hole where the blast occurred.

I have stood alongside of these chutes, did not even go down when I blasted two sticks of powder in this chute simply because I knew the powder was confined in the steel box and I knew that if I stood 10 or 15 feet away that was enough for me and I saved the time necessary to climb 15 feet [54] of ladder and go down. I have actually done that myself. I have worked with powder all my life and I believe I have a very fair knowledge of the effects of it.

We do not haul the ore out on the same cage as the passengers. We do haul material and supplies down on said cage. The cage is moving up and down practically all of the time during the shift by the bosses traveling back and forth and by men with material, supplies, drill steel, etc. I have very seldom seen a cage standing still.

(Testimony of W. V. DeCamp.)

Redirect Examination by Mr. ANDERSON.

Page 119—Transcript of Evidence.

There would be no appreciable concussion with a man standing 35 feet from the raise on the floor of the tunnel or level. I would say there would be no jar at all, 25 or 30 feet away from the raise. I have been closer than that and have never had any ill effects. There might possibly be a ringing in the ears for a short time after the blast but no serious effects.

Recross-examination by Mr. WALTON.

Page 119—Transcript of Evidence.

I have had a ringing in the ears for a short time after a blast. The effect on the individual would depend on the extent of the explosion.

Testimony of Andrew Williams, for Defendant.

Page 127—Transcript of Evidence.

ANDREW WILLIAMS, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is Andrew Williams. I reside at Jerome, Arizona, where I work for the United Verde Copper Company. I was working for the United Verde Copper Company in June of 1922. I had worked there about a year and a half before that time. I know the plaintiff, Joe Jaber. I am the man sometimes called Shoemaker. Jaber worked with me in June, 1922, at the 1,000 [55] level. He worked with me about a week loading trains.

(Testimony of Andrew Williams.)

At that time I was loading trains in the chutes. Jaber never told me about being injured by a blast. I usually set off the blasts myself. We would use perhaps a quarter of a stick or half a stick. He usually helped me until I was ready to spit the fuse, then I turned on the air and hollered "fire" so that if anybody was around close, he would have a chance to get away on the side. I would be right close to the cars—15 or 20 or 30 feet from the chute; sometimes more and sometimes less.

Jaber never told me he was blasted. He did tell me he was sick. While he was mucking in 1 and 2, he told me he was dizzy. I told him to go to the hospital or to go to the druggist to get something. He never said anything about being blasted. I did not see him again until three weeks or a month later when I saw him on the street. Then he said, "Do you remember the time I was blasted right in my ears?" I know of no time when he was blasted. I later saw him in the hospital. I never took this man to the station at any time while he was working there either because he was injured or sick. The week that Jaber was working there, there was also a motorman working at the 1,000 feet level. His name was Bob Pate. He is still working for the United Verde.

Cross-examination by Mr. WALTON.

Page 134—Transcript of Evidence.

My name is Andrew Williams not William Shoemaker. I have lived at Jerome about eight years.

(Testimony of Andrew Williams.)

I am part German and part Polish. I never told Doctor Tom anything. He called me to his office and asked me about this blast but I made no report to him. I don't remember that Jaber ever called to me and asked why I set the blast off without letting him know. I never did laugh at him nor did I say I did not think it would hurt him. [56] I am sure of that. I am sure I never made the report to Doctor Tom about Jaber being blasted. Later I met Jaber on the street and asked him what was the matter. He asked me about the blast and I laughed and said I did not know. I thought he was just kidding me or something like that. I did not laugh at him down in the mine. I did not tell him to go to the little station with me nor did I tell him to wash his face. I didn't know anything about him lying on a bench in the station until the shift went off. I don't know if he was sick at that time or not. All that he ever told me was that he was dizzy. I don't remember any other incident. He told me he was dizzy a few days after he started to work with me. He told me he was dizzy while I was standing there waiting for the other train to load. I did not put my hands over my ears when a blast went off. The blast is not ever heavy enough down there to think about it. I have been in this country since 1907. I am a citizen, 32 years old.

(Question by Mr. ANDERSON.)

I am an ex-service man and served in the United States Army.

Testimony of Doctor A. C. Carlson, for Defendant.

Page 138—Transcript of Evidence.

Doctor CARLSON, a witness on behalf of defendant, being duly sworn, testifies as follows:

My name is A. C. Carlson. I am a physician and surgeon living at Jerome, Arizona. I am chief surgeon of the United Verde Copper Company hospital at Jerome, Arizona. I am a graduate physician and surgeon, licensed to practice in Arizona. I have had experience with the Los Angeles County Hospital, Rockefeller Institute in New York, post-graduate work at the Post Graduate Hospital at New York and the present hospital. [57] I have been with the United Verde Copper Company hospital for more than ten years.

I do not recall when I first saw the plaintiff in this case but he was admitted to the hospital on July 1, 1923.

I examined the plaintiff's urine when he was admitted to the hospital and found he had chronic nephritis. This is an involvement of the kidneys. It is ordinarily called Bright's disease. The symptoms which this man had which I associated with Bright's disease was dizziness. The analysis I made of the urine, which is done by heating acetic acid, centrifuging the urine and examination under the microscope. This analysis showed presence of albumin and presence of casts under the microscopic examination and epithelial cells. The man looked sick. He was sick and in need of care

(Testimony of Dr. A. C. Carlson.)

which we gave him. When this man came to the hospital, he was suffering from backache and dizziness and due to the urinary examination, which proved he had Bright's disease, we treated him for Bright's disease at that time. He did not complain of a blast at the time he was admitted to the hospital. The first time that I knew that he complained of a blast was when it was brought to my attention by one of the other doctors on July 20th (?). I made a record of it at that time. He complained that he was deaf in his left ear from a blast. He was admitted on July 1st and left of his own accord July 12th. Later he came back to the hospital again. When he first came to the hospital, he was placed in bed for a rest and given a milk diet. After he reported his deafness in his left ear, I personally looked into the ear to see if there was anything in the canal. Not seeing anything and not being an ear specialist, I asked Doctor Tom to send him to Doctor Swetnam as I was leaving the city for a few days. He was referred to Doctor Swetnam who is an ear, [58] nose and throat specialist at Prescott. I received a report from Doctor Swetnam of his examination. Mr. Jaber was readmitted to the hospital on August 7th. So far as the condition of his urine, it was the same when he came back the second time. His general condition was apparently the same. I could see no improvement. He was still suffering from Bright's disease and his complaint of deafness in the left ear for which we had sent him to Doctor Swetnam.

(Testimony of Dr. A. C. Carlson.)

He left again of his own accord on September 8th. In the meantime, the treatment we gave him was rest in bed and milk diet which is the standard treatment for nephritis. He came to my office again on the 18th day of September when I saw him. Mr. Jaber resented the milk diet and stated he was ready to do anything I told him to do. I sent him to Doctor Snipes who is a dentist in Jerome. Joe then got up and said goodbye and said he was going to Phoenix because we did not know what we were talking about. His condition then was about the same as when he was first admitted to the hospital. It is my opinion that the cause of his illness and condition was Bright's disease. Dizziness and tenitis or ringing in the ears are characteristic symptoms of Bright's disease. It is my opinion that this dizziness and ringing was due to Bright's disease or from the same focus of infection that originally caused his Bright's disease. While he was in the hospital I saw the plaintiff every day as I made daily rounds at every ward and room in the hospital twice a day. He complained about the restricted diet of milk. Plaintiff was permitted to have all the milk he wanted. He was restricted to milk diet so as to put the least amount of work on the kidneys in trying to improve the condition of the kidneys. On the recommendation of Doctor Swetnam, we X-rayed the sinuses of his head and his chest. I have taken X-ray [59] pictures and read them for several years. You can see soft tissues in X-ray but not to tell whether there is a disease of a nerve from an

(Testimony of Dr. A. C. Carlson.)

X-ray picture. We took these X-rays to ascertain if there was any focus of infection or abscesses in his sinuses or a pulmonary condition. He did not return to the dentist for treatment. I have not seen him since the 11th of September until to-day. That is my recollection. He left the hospital voluntarily both times and was not discharged as cured of this disease. We were ready and willing at all times to continue to treat him and did everything we could for him. If this man's ear had been injured by a blast, it is my opinion that he would have had some evidence of it at the time of the accident. At the time of the blast and not long afterwards. A blast would not cause a condition such as we found without some external evidence of injury. Bright's disease may be caused by numerous conditions such as scarlet fever, diphtheria, typhoid fever and severe case of pneumonia, infected tonsils or infected teeth. As a rule, Bright's disease always has another primary focus. There are very few kidney conditions that are primary. It takes some time to develop Bright's disease. It does not develop in three or four days after a blast.

At the time he left the hospital to go to Phoenix, he said that the doctors at the hospital and the dentist did not know what they were talking about. His trouble was due to a blast.

Cross-examination by Mr. WALTON.

Page 154—Transcript of Evidence.

While I am not an ear specialist, if there was a

(Testimony of Dr. A. C. Carlson.)

severe trauma from a blast, he would have some external evidence of it.

Jaber complained of dizziness and ringing in the ear from [60] the beginning. Ringing in the ear is a tenitis. Tenitis is a ringing in the ears and that is due to high blood pressure, secondary to nephritis. I don't know anything about the different forms of tenitis but when I find tenitis as a symptom and I have my urinary findings of albumin and casts, I do know that the man has nephritis. The symptoms of shell shock vary so greatly that one patient might have tenitis as a symptom and another might not. Plaintiff was admitted as a sick patient because he came and asked to be admitted to the hospital. If a man suffered a blast, the rupture or hemorrhage in the inner ear, he would undoubtedly experience extreme dizziness, deafness on that side and would possibly be nauseated due to the pressure of blood in the inner ear. Tenitis would be along with the other symptoms. When Joe came to the hospital he complained of backache, dizziness and his ear. We looked to his urinary findings to find out what was causing his backache, dizziness and the extreme heavy-coated tongue. He was in the hospital twelve days and saw me every day but he never mentioned the blast during those twelve days. He mentioned the blast on the 20th day of July. According to our records he went to see Doctor Swetnam in Prescott on August 3d. We never told him that we had cured his kidney trouble. Plaintiff was readmitted to

(Testimony of Dr. C. R. K. Swetnam.)

the hospital on August 7th after he returned from Doctor Swetnam and was put to bed on the same treatment.

Testimony of Doctor C. R. K. Swetnam, for Defendant.

Doctor C. R. K. SWETNAM, a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. ANDERSON.

Page 162—Transcript of Evidence. [61]

My name is C. R. K. Swetnam. I am a physician practicing at Prescott, Arizona. I specialize in ear, nose and throat. I am qualified to practice in the state and have been such since January of 1906. I practiced in general medicine in a hospital in Washington, D. C., for a year and a half. In Arizona in general practice until 1912. In Vienna, Austria, for a year and a half following that and then in the city of Los Angeles in private practice and hospital work and then back to Arizona for the last two years or nearly so. I have been specializing in one line of work for nearly eleven years.

I know the plaintiff Joe Jaber. He was referred to me as a patient last August by Doctor Tom who was connected with the United Verde Copper Company hospital at Jerome.

I made an examination at that time of his ears, nose and throat. I found Mr. Jaber was suffering from neuritis or degeneration of the eighth nerve

(Testimony of Dr. C. R. K. Swetnam.)

in the left ear and slightly so in the right. There was no evidence of any injury or external violence to the ear or head. I found pus in the tonsils and pus around some of the teeth and came to the conclusion that the condition of the nerve was a toxic or poisoning condition. Toxic means poisoning simply but in a condition of that kind we try to divide it because it might be an infection that is secondary in the nerve or it might be a simple irritation of the nerve by poisons. This poison could come from pus, from breaks or from any other cause such as tobacco, whiskey or any of the things might *might* cause a toxic condition of that nerve. Pus in any place from the crown of the head to the sole of the feet could have the same effect. I secured the history of the case mainly from Mr. Jaber himself. I made no examination of the condition of Mr. Jaber's kidneys but did receive that information from the [62] United Verde hospital doctors.

Doctor Swetnam was then excused so that he might go to his office to try to find a letter which Doctor Tom gave to Mr. Jaber to give to Doctor Swetnam at the time that he was sent there for an examination.

Testimony of Doctor James Malcolm Walsh for Defendant.

Page 168—Transcript of Evidence.

Doctor JAMES MALCOLM WALSH, a witness on behalf of defendant, being duly sworn testified as follows:

Direct Examination by Mr. ANDERSON.

Page 168—Transcript of Evidence.

My name is James Malcolm Walsh. I am a physician at the United Verde Copper Company hospital in Jerome, Arizona. I have been in that position for about five years. I am a licensed physician and surgeon of the State of Arizona. I have been practicing medicine for five years. I have taken a few post graduate courses. I have had two or three years of hospital work and I think that is all. I am a graduate of the University of Michigan. I was connected with the United Verde Copper Company hospital in June, 1922. I am acquainted with the plaintiff. I think I saw him the first time in May, 1922. I examined him when he was going to work for our company. In making the examination, we had him take off his clothes and looked over the surface of his body for any signs of accident or injury. We examined his eyes, as to distance vision. We examined his ears as to the spoken voice. We examined his heart and his lungs, took his height, weight, age, name and whether married or single. We made no specific examination of his hearing. Neither did we make

(Testimony of Dr. James Malcolm Walsh.)

an examination of his kidneys or the functions of the organs of his body. The only purpose of our examination was to see if there was any external evidence of injury. The next time I [63] saw him was on June 26, 1922, when he came into the hospital complaining of sickness. The record card was made of that event (the card was handed to the witness). This is a record of Mr. Joe Jaber when he came into the hospital for the treatment of sickness on June 26, 1922. It is a record of the first three days.

The card was marked Defendant's Exhibit 3 and offered in evidence.

(Questions on *Voir Dire* by Mr. WALTON.)

I did not make all of the record. I made all on the front side. I did not make the other side. We put down the most important things that he told us. The other side of the card was prepared by Doctor Carlson at a later time. The face of the card was admitted as Exhibit 3. The reverse having been made by Doctor Carlson was excluded.

Examination Continued by Mr. ANDERSON.

If a man reports an accident, very careful record is made of it on a special card for accidents which are kept separate and distinct from other record cards. This card is a record for sickness which I made of this man. When the plaintiff came in he told me he was dizzy. I looked at him but not at his ear. His tongue was heavily coated. I gave him medicine and sent him home just as he testified

(Testimony of Dr. James Malcolm Walsh.)

on the witness-stand. At that time he made no report concerning an accident. He did not say he had been blasted or hurt in the mine in any way. I saw him again the next day and the third day. I took a specimen of his urine just as he stated and made an examination of it. I did this because his dizziness did not clear up with the simple purgative and after I made an examination of the specimen, I had no occasion to go any further. I found albuminaria and knew immediately that he [64] was suffering from kidney disease. I told him that he was suffering from kidney disease and to go home and go to bed and take nothing but milk and water. At that time he told me absolutely nothing about a blast or injury. The technical name for the disease of the kidney is nephritis, Bright's disease. I don't remember Jaber ever telling me about an injury. I saw him many times afterwards but I was not taking care of him any further. The standard treatment for the disease from which this man was suffering is rest in bed and a diet of milk and water. I do not remember the date he was admitted to the hospital but recall that he came there with his friend and asked that he be admitted because they could not take care of him at home. He was admitted. Dizziness and ringing in the ear are symptoms of nephritis and may affect the hearing. I did not notice any evidence of an injury to the head or ear because he did not mention it and I did not look for it.

(Testimony of Dr. James Malcolm Walsh.)

Cross-examination by Mr. WALTON.

Page 180—Transcript of Evidence.

I never heard of any difference or division of tenitis into simple and compound.

When Jaber came to the hospital, he looked to me like a sick man and he told me he was dizzy. He did not complain of his ear and he did not report any accident. I do not try to discourage or keep out the records of these accidents. I am a practicing physician. I am employed to practice medicine, not to keep down the record of accidents. In nephritis, the cause of the trouble in the ear is toxin from the disease. It is caused by high blood pressure by the result of the toxin. If a man was injured in the ear from a blast, dizziness would be one of the first symptoms. Probably sickness at the stomach and vomiting. Tenitis would probably immediately set up. [65] In nephritis the attack may be on either one or both ears because you might have only one nerve affected. If Jaber had mentioned a blast to me, I would have associated his symptoms with the blast except the coated tongue. Of course that would not come from a blast. I would not expect a coated tongue from a blast. While it is possible that a hemorrhage of the eighth cranial nerve might have caused his ear trouble, I would have expected the symptoms to be a little more pronounced in case of the hemorrhage.

Redirect Examination by Mr. ANDERSON.

Page 189—Transcript of Evidence.

If a man was blasted, he might have dizziness

(Testimony of Dr. C. R. K. Swetnam.)

and nausea but he would not have pus around his teeth or in his tonsils nor would it cause the kidney trouble which we found.

Doctor C. R. K. Swetnam, for Defendant (Recalled—Redirect Examination.)

Redirect Examination by Mr. ANDERSON (Continued).

Page 191—Transcript of Evidence.

I have found the original of the letter I received from the United Verde hospital.

His letter was then marked Defendant's Exhibit 4 for identification.

Doctor Swetnam then identified a letter dated August 5, 1922, written by him to Doctor Tom of the United Verde hospital after examining Mr. Jaber and in reply to the letter marked Exhibit 4.

The objection of counsel for plaintiff to Exhibit 4 (letter from the United Verde hospital to Doctor Swetnam and to the letter written by Doctor Swetnam to Doctor Tom) was sustained and defendant asked for and was allowed an exception to such ruling (page 194 of Transcript of Evidence).

It was my opinion, after examining the patient that his condition was caused entirely by a toxic condition. There [66] was absolutely no evidence of external violence to the ear or the head. I told the patient that his condition was a disease of the ear caused by some kind of poisoning. I told him that the blast had nothing to do with him. I referred him back to the hospital for general treatment and to try to eliminate *or* sources of poison.

(Testimony of Dr. C. R. K. Swetnam.)

I told the doctor at the United Verde hospital to search for all evidence of poisoning. In my opinion the proper treatment in this case was to remove the source of poison that might cause the trouble in the ear. Rest and time would be the only sure treatment. I did not examine Mr. Jaber below the throat.

I told the patient what I thought was wrong with him and sent him back to Jerome.

Cross-examination by Mr. WALTON.

Page 199—Transcript of Evidence.

The plaintiff had a neuritis which was caused by the toxic condition. The evidence was pus in his tonsils and around some of his teeth. Those teeth were loose. I do not know whether they would tighten again. I don't know what makes a tooth loose from pus. I just remember that he had pus around those teeth and I was interested to get rid of the pus to cure his ear.

Jaber told me about a noise from a shot—he said a little shot.

Even though he told me that he was subjected to a loud noise from a blast and had had no trouble with his ear, no headache, no dizziness and no roaring in his head prior to that time and immediately after the blast, the symptoms set up that he complained of, I would not associate that with an injury to his ear from a blast in his case because he told me that the loss of hearing was not then, it was several days later. The loss of hearing would not be progressive from an air [67] concussion.

(Testimony of Dr. C. R. K. Swetnam.)

The loss would happen immediately. Tenitis is simply the Latin word for noises in the ear.

If a man was suffering from a blast which caused an injury to a nerve of hearing, he would have dizziness and tenitis and might or might not have a rupture of the ear drum.

The cochlea is the end of the auditory branch of the eighth nerve. If absolutely broken, it could not be repaired but if the hearing was impaired by an injury to that nerve, there is no treatment that will relieve it except time, depending upon the actual condition of that nerve. For practical purposes, a complete recovery might be had. Jaber was very nervous when he came to see me.

Redirect Examination by Mr. ANDERSON.

Page 219—Transcript of Evidence.

The condition which I found in this man's ear might clear up in time, depending upon the amount of the poison in his body.

Recross-examination by Mr. WALTON.

The possibility of recovery would also depend upon the character of the injury if it had been due to an injury. I cannot prove that it was due to a toxic condition of this man's body.

Redirect Examination by Mr. ANDERSON.

Page 220—Transcript of Evidence.

Treating the man as a patient and not as a court case, my opinion is that the trouble with this man's ear was due to a toxic condition.

(Testimony of Dr. C. R. K. Swetnam.)

Recross-examination by Mr. WALTON.

In examining this man I was acting toward him as a patient of my own, not because he was sent to me by the defendant. I did not charge my bill to them. I did not consider him as their patient and never sent the bill to them. [68] They said they would stand good for it if he could not pay it. He offered to pay me at the time but he said he only had \$25.00 and I told him to keep it.

Redirect Examination by Mr. ANDERSON.

I endeavor at all times to give my best opinion according to my knowledge and judgment of the situation.

Testimony of Doctor Robert C. Buck, for Defendant.

Page 222—Transcript of Evidence.

Doctor ROBERT C. BUCK, a witness on behalf of defendant, being duly sworn testifies as follows:

Direct Examination by Mr. ANDERSON.

My name is Robert C. Buck. I am a physician in the employ of the United States Public Health Service stationed at Whipple Barracks, Arizona. I am a regularly licensed physician and surgeon. I had general practice about five or six years. Then I specialized in private practice—then about two years in the army during the War in the eye, ear, nose and throat department, at Camp Custer, Michigan, and three years in Public Health Service in charge of the eye, ear, nose and throat depart-

(Testimony of Dr. Robert C. Buck.)

ment at Whipple Barracks. I specialize in eye, ear, nose and throat work at Whipple Barracks. I was informed several days ago that I had been appointed by the Court to examine the plaintiff in this case. I examined the plaintiff's ear last Thursday. I made no general examination. I examined his ears to see whether or not he could hear. After the examination, it was my opinion that he could hear equally well and very well in both ears at the present time. There is no difference in either ear in my opinion at the present time.

I put him through about the usual routine examination [69] that I make of all patients. It is one of my duties to make a routine entrance examination of every patient entering the hospital at Whipple Barracks. We have about 575 now and I put him through about the usual routine examination, with some additions, to cover the possibility of malingering. The first test which I gave him is known as the Weber test. This consists of sounding a tuning-fork and placing the handle on the forehead. The sound waves are carried by bone conduction to the internal ear to the nerve endings. It is entirely different that sound conveyed through the ear, particularly as the fork would be held in front of him here like this (indicating). The fork is held on the forehead and all sound is carried through the bones to the ear. In this test, if there is an internal ear deafness, the sound will be referred to the well or best ear. We use this too as a diagnostic point in differential diagnosis between

(Testimony of Dr. Robert C. Buck.)

the internal ear deafness or nerve deafness, and middle ear deafness. If it is a case of middle ear deafness, the sound will be referred to the poor or deaf ear. If it is nerve deafness or internal ear deafness, it will be referred to the good ear. That is for the reason that sound waves coming through the natural course into the ear meet the obstruction in the middle ear and are interfered with, while sound waves coming down through the bone is carried direct to the nerve through the bone and the good ear, in internal ear deafness, will hear that and the poor ear not so well. In the test which I gave him, I asked him if he could hear the fork when I held it to his forehead and he said he could and I asked him to tell me which ear and he could not tell which ear it was. I tried him two or three different times and he could not tell which ear it was. That is characteristic where there is no difference in the hearing of the two ears. They will say they [70] do not know which ear they hear it in. They can't tell. Now, if the man has an internal or nerve deafness, it is certain that that sound wave is going to be referred to the well ear and he is going to hear it better in that ear. If he has a middle ear deafness, which is not claimed in this case, it is going to be heard best in the poor ear. This man seemed to hear it equally in each ear. That was the first test. Then I compared the two ears with—by means of tuning-forks and whistle and he responded perfectly normal in the right ear but he could not hear sounds, he says, with

(Testimony of Dr. Robert C. Buck.)

the left ear, that is, certain sounds. Now, if it is a nerve deafness or internal ear deafness, the high notes of the scale produced by a whistle will not be heard. We have to open the whistle up and produce a considerably lower tone before they can hear it. That occurred in his case but with a low tuning-fork, which has only twenty-six double vibrations per second, it is about equal to a very low pipe-organ and he could not hear that either. Now, he should hear that in an internal ear deafness, that is, he would be very apt to. Then, I took a stethoscope.

The stethoscope consists of two ear pieces which fit snugly into the ear and come down together at about this point (indicating) into one opening. I disconnected the tube on the right side and crowded it tight with cotton, so that no sound could go through that right tube going to the right ear and then I applied it to his ears, sounded the tuning-fork and held it in front of this opening and he heard the tuning-fork as long as it would ordinarily be heard and as long as it continued to vibrate—until the sound was practically gone and about as long as any one could hear it. Now, that sound could not have been conveyed through the tube to the right ear, because that right tube was plugged tight. I tried it on myself too, so that [71] any sound that he heard must have come through that left tube to the left ear and have been perceived by that ear and he heard through the stethoscope sounds which he claimed he did not hear when the tuning-

(Testimony of Dr. Robert C. Buck.)

fork was held directly in front of his ear. I also gave him what is known as the turning test to observe his nystagmus. I think it is a pretty well-known fact that if a person turns himself around a number of times and then stops he will be dizzy—everything is swimming. That is due to the—what takes place in the internal ear, the equilibrium mechanism, and for one ear we turn in one direction about eight or ten times and then stop them and have them look at the finger and follow it out in this direction (indicating) and the eyes will normally in a perfectly normal person—the eye will twitch towards that finger and it will gradually slow up. It will twitch from perhaps twenty-five to thirty seconds and we turned them one way for one ear and the other way for the other. I took this nystagmus test. I found that his nystagmus was equal either way that I turned him, showing that there was apparently no interference in the internal ear with his equilibrium mechanism.

He could not hear in his right ear through that stethoscope. That right tube was plugged tight. If he did get any hearing or did get any sound, which he says he did—admits he did—

Q. Did the patient know that that other side was plugged?

A. I don't think so, because, to continue the test and make it more complete, I did not, as we sometimes do, blindfold the eyes. I let him have his full vision. When I would compress the right tube and he saw that I would compress it, immediately

(Testimony of Dr. Robert C. Buck.)

the sound was shut off and he could not hear it. [72] If I pressed the left tube and left the right open, he claimed he could hear it again.

Q. During that time, he could only hear actually in the left ear? A. So far as his knowledge of my interfering with this tube, if I left them alone and his not knowing that that tube was plugged, he heard perfectly.

Cross-examination by Mr. WALTON.

Page 229—Transcript of Evidence.

I plugged this stethoscope after I had taken the Weber test, the tuning-fork test and the whistle test, I plugged it solid with cotton. I did not plug the man's ear. I do not admit that cotton is useless in stopping sound. In plugging a rubber tube 14 inches long with cotton, it is not going to convey sound. I am not familiar with Doctor McKenzie's work but I am with some others and know this stethoscope test is a standard test for malingering. I got it from Doctor Phillips. He says to plug with cotton, I think. He does not say to plug the stethoscope with wax. While it is true that Doctor McKenzie says that cotton or wool plugs, though popular are practically useless, as plugs when placed in the ear to keep out artillery fire, I do not agree that cotton does not obstruct sound or concussion when plugged in a tube twelve or fourteen inches from the patient's ear but it is common knowledge that when cotton is placed in a person's ear that he cannot hear very well with that ear. I know that the cotton placed in the tube of the stethoscope stops

(Testimony of Dr. Robert C. Buck.)

sound because it stopped the sound for me and I have normal ears. I did not plug the tube with wax or wood because I was in a hurry. I packed it with cotton so tightly that I had difficulty in getting it out afterwards. Any solid or semi-solid or liquid substance is a perfect conductor of sound if the instrument which produces the sound comes in contact with one part of that and the ear in contact with the other. But my tuning-fork did not touch the stethoscope. I examined this man's ear to see [73] if the ear drum was punctured. It is not necessary to puncture the ear to injure the nerve of the cochlea. 'I do not agree with Doctor McKenzie's statement because common experience is that you can plug the ear with cotton and shut out a great deal of sound. His statement applies to men who are working in occupations where there is continuous and extremely loud sounds and explosions. Noise and sound are the same in quality but there is a great deal of difference in quantity. A cotton or wood plug might be practically useless for the explosion of a cannon or for a boiler-worker or something of that kind where there is an extreme amount of sound but it would be adequate to shut out the delicate sound of a tuning-fork. I would probably agree with Doctor McKenzie that cotton stuffed in the ear would not be adequate to keep out a large volume of sound that you would get from the explosion of a cannon or high explosives or work in a boiler factory where the steam riveters are at

(Testimony of Dr. Robert C. Buck.)

work but I do believe that it would be entirely adequate to keep out the sound of a tuning-fork.

When I did not interfere with either tube with my fingers and he did not see me interfere and I held the tuning-fork in front of the stethoscope he said he heard that and heard it until it practically stopped vibrating. As the tube to the right ear was plugged, he must have been hearing out of his left ear. This man was not blindfolded when I was making the tests because I wanted some of the stuff from his own mind. You could make this stethoscope test by getting behind the patient but I had a reason for letting this patient see what I was doing.

Testimony of Doctor C. E. Yount, for Defendant.

Page 260—Transcript of Evidence.

Doctor C. E. YOUNT, a witness on behalf of defendant, being duly sworn, testifies as follows:
[74]

Direct Examination by Mr. ANDERSON.

My name is C. E. Young. I am a physician and surgeon located in Prescott, Arizona. I am engaged in general practice. I have been practicing in Prescott 11 years less 2 years and 11 months in the army. I am a regular licensed physician and surgeon in this state. I had 26 months in hospital work in the hospitals of Washington, D. C. I have had post graduate work at Harvard Medical in diseases of the nose and throat. I have had post

(Testimony of Dr. C. E. Yount.)

graduate work at Tulane University, New Orleans. I am consulting specialist in general surgery at the Veterans Hospital here.

One of the first symptoms of nephritis or Bright's disease is disturbances of the digestive tract, stomach trouble commonly called. If the doctor takes this reading and examines the urine, he may arrive at a diagnosis. If he does not, there will probably be other symptoms of headache, dizziness, ringing in the ear and sometimes even shortness of breath. These are more or less the earlier stages of nephritis. At first if the patient is showing symptoms of poisoning, damming up all things which should be thrown off by the kidneys, we would try to unload these. We would put him to rest in bed on a diet which is easily handled, making very little waste for the kidneys to eliminate, usually a milk diet. The rest in bed is very essential. Nature must make the restoration and we assist. Albuminaria with casts would show improper kidney function which we term nephritis or Bright's disease. In such a condition the best thing for the patient would be to go to bed on a liquid diet, largely milk. Pus in the tonsils and pus around the teeth would have a tendency for systematic poisoning. Poison from infections would be to impair the functions of the system. It might center on one organ or several organs and ultimately [75] it would make him sick.

(Testimony of Dr. C. E. Yount.)

Cross-examination by Mr. WALTON.

(Page 264 of the Transcript.)

A little pus in the tonsils or around the teeth would sooner or later produce a toxic condition of the system. Even though the man were 27 or 28, it would depend entirely on how bad the poison was and if his resistance to the germ is high enough, he can build up a carrier against it but if that power is broken down, he may show symptoms very early, even earlier than that age. Simple albuminaria is not Bright's disease. It might not come from the kidneys. It might come from the bladder or other part of the tract. We could not say it was nephritis if there is just albuminaria. Casts are cylindrical bodies thrown off because of diseased conditions in the tubules in the kidneys. You cannot see them without a microscope. Nephritis is a progressive disease. It is not a primary disease. I mean that it does not start without some other cause. Kidneys are eliminative organs and when they are crowded, they give way under it. The first symptoms of nephritis is gastric disturbances. I think it is the thing most frequently overlooked because the stomach is not doing its work and the doctor gets busy on the stomach and as a matter of fact there is something behind it all. Next I think casts very probably and sometimes the eye specialist can find inflation in the eye and the ear specialist may find it in the drum or by tests in the ear. If there is great damming up of poisons which should be thrown off,

(Testimony of Dr. C. E. Yount.)

there is probably increase in the blood pressure, slow pulse. Of course we have the ear symptoms or very often improper hearing just as there is improper eye sight and dizziness. Roaring in the ears. This may appear in both ears or in one ear. If there was a previous ear disease it would probably show first in the ear that was previously diseased. [76] If there was no previous ear disease, I would expect to find it in both ears simultaneously. The ringing in the ear may be caused from high blood pressure or it may come from the effects of the poison circulating there in the nerve endings. We also have ringing in the ear from low blood pressure. Just before a patient faints, you have an extreme ringing. You may have ringing in the ear with normal blood pressure. My opinion is based both upon attending patients suffering from nephritis and information received from books.

Testimony of Robert F. Pate, for Defendant.

Page 269—Transcript of Evidence.

ROBERT F. PATE, a witness on behalf of defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. ANDERSON.

My name is Robert F. Pate. I am a motorman working for the United Verde Copper Company at Jerome. I have been working there off and on for the last five years. I was working for them as a motorman in June, 1922, at the 1000 foot level. I know the plaintiff, Joe Jaber. I know Mr. Will-

(Testimony of Robert F. Pate.)

iams sometimes called Shoemaker. They were working there in June of 1922. I remember when Mr. Jaber put in a few shifts on the 1000-foot level not over a week or so. He was working with Williams at that time.

I was motorman there at the time Jaber and Williams were working on the 1000. I was back and forth all of the time.

(Questions on *Voir Dire*.)

I was operating a motor, moving the trains in and out of the tunnel. I stayed on my motor most of the time. While Shoemaker and Joe Jaber were working there I had my motor pulled up within 20 feet of Chute No. 2. The car man was there beside [77] me. There was a crew of three men. There was Williams and Mr. Jaber. The third man was myself. I was in my motor when a blast went off in either chute No. 2 or No. 3. There never were more than one or two shots at the most. There was no complaint of anyone getting hurt at that place. Mr. Jaber didn't complain at that time.

Cross-examination by Mr. WALTON.

Page 275—Transcript of Evidence.

I do not know how many blasts were set off. We were blasting on and off. I do not know what blasts were set off when I was not there. There was no blasting when I was not there. The orders were that they were not to do any blasting when I was not there because I was responsible for my two men. I set most of the blasts off myself. Mr. Shoemaker was not supposed to do the shooting.

(Testimony of Robert F. Pate.)

If he did, he did it on his own hook. We never had to blast these shots over a couple of times.

Redirect Examination by Mr. ANDERSON.

Page 277—Transcript of Evidence.

The reason we blasted was so that we could load the ore into the cars.

Recross-examination by Mr. WALTON.

Page 277—Transcript of Evidence.

I had charge of the blasting. At that time I did the blasting but now they have a miner who does all of the blasting.

Redirect Examination by Mr. ANDERSON.

Page 278—Transcript of Evidence.

We never blast unless the ore was stuck in the chute and would not come down in the cars and we never blast any other time.

Mr. ANDERSON.—Defendant rests.

PLAINTIFF'S EVIDENCE IN REBUTTAL.

[78]

Testimony of M. Farrage, for Plaintiff (In Rebuttal).

Page 279—Transcript of Evidence.

M. FARRAGE, a witness on behalf of plaintiff being duly sworn, testified as follows:

My name is M. Farrage. I live in Jerome. I lived there in June, 1922. I am a merchant there and have been such for seven years. I know Joe Jaber. I accompanied him to the United Verde Hospital about the 27th or 28th of June, 1922. I

(Testimony of M. Farrage.)

took Joe Jaber on the first of July, I think, and asked the doctor to put him in the hospital. Doctor Carlson and Doctor Tom. I told them he was so dizzy he could not sleep in his room. He said he was dizzy from a blast in the mine but the doctor said there was nothing of the kind. He told the doctor he was hurt from that shot and the doctor, I don't know if it was Tom or Carlson asked him how far he was from the blast. He said about 35 or 40 feet. The doctor said, I don't think it is from that but we'll take care of you and put you in the hospital for a while and find out."

No cross-examination.

Testimony of Dr. J. B. McNally, for Plaintiff (In Rebuttal).

Page 281—Transcript of Evidence.

Doctor J. B. McNALLY, a witness on behalf of plaintiff, being duly sworn testifies as follows:

Direct Examination by Mr. WALTON.

My name is Doctor J. B. McNally. I live in Prescott, Arizona. I have lived here over 26 years.

Doctor McNally's qualifications in every respect was admitted by Mr. Anderson for the defendant.

If a man has a tooth or a number of teeth loose from pus around them, they will never tighten again. That is, they will never tighten permanently. I examined Joe Jaber two or three days ago. I examined his blood pressure. It was 130, [79] normal for a man 28 years old. Continuous dizziness and noise in the ears is sometimes

(Testimony of Dr. J. B. McNally.)

found in nephritis of old standing. Chronic Bright's disease in aged people. People where there is hardening of the ossicles of the ears and where arterio-sclerosis and hardening of the arteries of the whole body, high blood pressure incidental to nephritis. Hardening of the arteries is usual in advanced cases of chronic Bright's disease. It is not likely that a man would have an advanced case and still have normal blood pressure. In cases of chronic nephritis the noise is usually in both ears and is usually a crackling noise. Sometimes it runs along like a hum and then there will be all of a sudden a crackling, irregular condition. In the case of an accident to the ears, there is an ordinary howling noise such as a buzz which is constant and does not change. This is not likely found in nephritis. I examined Mr. Jaber's urine. I found albuminaria. I did not find any true casts.

If a man was in an advanced state of nephritis, with noise in his ears and deaf, he would be anaemic, round and hardened pulse which I do not find here in this case. I found a soft pulse, regular and about normal.

Cross-examination by Mr. ANDERSON.

Page 284—Transcript of Evidence.

I found no true casts. He may not be suffering from kidney trouble if it is albuminaria. There is lots of albumin from the system. It is one of the symptoms of nephritis or Bright's disease. I tested his hearing. His hearing is very poor in his left ear. I also examined his ears. I found that in

(Testimony of Dr. J. B. McNally.)

the left ear, the drum had lost its mother-of-pearl appearance and was sluggish looking and more or less slightly congested, a little retracted into the middle ear. Did not shine on the application of light, was dull and heavy. The right ear was slightly impaired too. There was a slight impairment [80] or slight retraction and loss of brilliancy of lining membrane or tympanium or drum of the right ear. I think there might have been an infection in the body somewhere. I inflated the middle ear with the eustachian catheter; that is the left ear and it was very easily inflated. Albumin in the urine usually is indicative of some pathological condition. If there is pus around the teeth, then there is a destruction of the tissue in the cavity where the teeth reside, usually leaving the cavity too large for the tooth so that the tooth is loose and wiggles. The pus is the basis of the infectious condition. What we look for is not the looseness of the tooth but the pus, to see if there is any infection there. In addition to the albuminaria test, I made the sugar, albumin and cast test. The specific gravity was within the range of normal. I found no sugar and no true casts. There is noise in the ear in acute nephritis but we find it more often in chronic nephritis. The leading symptoms of acute nephritis is scanty, highly colored urine with a heavy specific gravity, probably some swelling or dropsical condition. His entire system somewhat heavy, backache. If a patient came to me with dizziness, ringing in the ear, his tongue

(Testimony of Dr. J. B. McNally.)

coated and the next day or two, on examining his urine, found there was a good deal of albumin and casts, I would put him to bed on a bland liquid diet. By bland liquid diet I mean milk and water. If there were symptoms more urgent, I would probably sweat them, clean them out thoroughly, keep their liver and bowels working, open up the avenues of elimination as much as possible.

Redirect Examination by Mr. WALTON.

Page 290—Transcript of Evidence.

If a patient came to me and said that immediately after a blast went off he began suffering with a noise in his ear, headache and dizziness, I would make an examination and [81] see the condition of the ear. If he had a little albuminuria and suffers from a blast and immediately tenitis starts and dizziness starts, I would naturally infer that there was some injury to the mechanism of the ear or both ears as the case might be. Usually the one nearest the blast. It would be rather suspicious one ear being infected that way. Of course I did not see him until about day before yesterday. I don't know what condition his ear was in a year ago. The symptoms of constant ringing in the ear, dizziness and pain in one ear can be associated with an injury by a concussion or blast.

Testimony of W. V. DeCamp, for Plaintiff (Recalled—Cross-examination).

Mr. DeCAMP, a witness for defendant, was recalled for further cross-examination by Mr. WALTON.

The bottom and sides of the chutes are lined with one-inch steel plate. They are not set on the rock but on "I" beams. The chutes are made of steel plate, not particularly to withstand the blasting. The greatest wear and tear and strain comes from ore continually passing through the chutes. The No. I and No. II chutes extend to 300-foot level—about 700 feet long. We usually blast only once or twice. In chutes No. 1 and No. 2, they load a train of ten cars, 20 tons to each car in seven minutes and there is no blasting. Steel plates were not put in in relation to the heavy blasting. It is for the wear they are subject to with the passing of 500 to 1500 tons a day passing through each of the chutes. We are passing an enormous tonnage of rock. Chutes Nos. 1 and 2 are 26 inches wide. We have recently enlarged Nos. 3 and 4 to four feet eight inches wide. Chutes Nos. 1 and 2 are 26 inches high. Usually the rock going down through these chutes are passed through a crusher above which is 16 inches wide. [82]

Testimony of Mike Krnich, for Plaintiff (In Rebuttal).

MIKE KRNICH, a witness for plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. WALTON.

Page 295—Transcript of Evidence.

I am a miner, have been since 1903. I have mined pretty nearly all around United States, Alaska, Nevada, California, Arizona. I worked for the United Verde Copper Company at Jerome about August 28 last year. I am acquainted with the steel chutes in the mine and I am acquainted with the blasting there. The amount of powder put in a chute depends on how a chute is blocked up. If it is a big boulder, you put in four or five sticks. If it is high up 20 feet, you can't go up there. You would tie it to a wooden stick and tie five or ten sticks through that door and explode it. If it is 40 or 50 feet high you've got to put more powder. Lots of times you have to blast several times. I blasted one day eight times. If it doesn't come you keep increasing the powder. In case of a wide place, there is no protection. But if there is a pillar between the blasting and the place where you are, you can stay about 8 feet. You should go out about 100 or 75 feet anyway. If I was blasting I send men on one side and I go on the other to watch that somebody don't come. If you are in the middle of the tunnel, you go from 60 to 100 feet away not in the middle of the tunnel but on the sides, be-

(Testimony of Mike Krnich.)

hind the post or some place where it is somewhat protected. If a man is close to a chute and keeps his mouth closed, why it can jar his stomach. There is smoke and dust and you have to keep the mouth closed. The jar may effect the ear. The chutes are made from steel to protect them from blasting and heavy weight. [83]

Cross-examination by Mr. ANDERSON.

Page 299—Transcript of Evidence.

We go down the tunnel to get away from the rocks. You must also be afraid of the concussion. I blasted with 14 sticks once but I blasted with less than that. Stick and a half on ground like that don't amount to much. If the whole chute is clogged you use a heavy blast. If it is only a boulder, you use a small blast.

Recross-examination by Mr. ANDERSON.

Page 301—Transcript of Evidence.

I am not working now. I have not worked for about six months. I was not working in the mine at Jerome in June, 1922.

Testimony of Joe Jaber, in His Own Behalf (Recalled—In Rebuttal).

JOE JABER, the plaintiff, was recalled as a witness in rebuttal on his own behalf.

Direct Examination by Mr. WALTON.

Page 302—Transcript of Evidence.

I do not know Mr. Pate who was on the witness-stand. I did not see him there when Shoemaker

(Testimony of Joe Jaber.)

and Zanovish were working with me there. I know a fellow was on the motor but I don't remember who it is. I don't remember for sure if the man on the witness-stand is him or not. I don't remember if I saw Mr. Pate on the motor in the tunnel. I don't remember if he was there when I got hurt. I think it is but I don't know for sure. When I was hurt I called one fellow. I don't remember who it is but even if I seen him, I can't tell who it is because I was too sick from the first. I saw a man help me and I don't know him for sure and I don't know his name either. When he helped me I asked him to call the cage for me. He says, "I am just a stranger like you. I don't know how to call the cage." When I first saw Doctor Tom, I told him about the blast. Mr. Farrage was with me the first time I saw Doctor Tom. I did not tell Doctor Swetnam I was 75 or 80 feet from the blast. I told him 30 or 35 feet, maybe 40. [84] Before the blast that hurt me went off, that chute had been blasted six or seven times. I asked him why he blasted there and he said, "This chute is full of water and iron and timber and plugged right close to the door." Right after I was hurt I told Shoemaker about it and he laughed at me. Doctor Tom told me that Shoemaker reported to him about the blast.

Mr. WALTON—Plaintiff rests.

(Argument by counsel to jury.)

Whereupon the Court instructed the jury as follows:

Instructions to the Jury.

Page 307—Transcript of Evidence.

The COURT.—Gentlemen of the jury: It now becomes my duty to charge you as to the law that will guide you in your deliberations in this case. In the trial of civil cases, it is the exclusive province of the jury to determine the facts. It is the exclusive province of the judge of the court to charge the jury as to the law by which they must be guided in the consideration of the case and this law as stated to you in these instructions it is your sworn duty to accept and follow as the law of this case. Any ideas that you may have as to what the law should be, it is your duty to disregard and to be governed by the law as given to you by the Judge of this court. If the Court commits any error in stating the law to the jury, that error may be corrected by the Court in the manner provided by law. This action is brought by the plaintiff, Joe Jaber, against the defendant, United Verde Copper Co., to recover damages for an injury resulting from an accident which he claims to have sustained on the 27th day of June, 1922, while the plaintiff was in the employ of the defendant. The action is based upon what is known as the Arizona Employer's Liability Act (Reading from Revised Statutes of Arizona, 1913, Civil Code): "Section 3154. That [85] to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said

Section 7 of Article XVIII of the state Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured. Section 3155. The labor and service of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section. By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein. Section, 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows: Subdivision 8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters."

Under the Employer's Liability Act, the plaintiff, in order to recover, must show:

First: That the plaintiff was in the employ of the defendant.

Second: That the master was engaged in one of the [86] hazardous occupations and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Third: That the accident, if any, was not caused by the negligence of the plaintiff. Under the Employer's Liability Law, the labor and service of a workman at manual and mechanical labor in the employ of any person, firm, association, company or corporation in and about a mine is service in a hazardous occupation within the meaning of the said Employer's Liability Act. The Employer's Liability Act covers other occupations but you are concerned solely with the question of whether or not the plaintiff was employed by the defendant and engaged in labor and service in and about defendant's mine.

As to the first question involved that the plaintiff was employed by the defendant, this fact must be established to your satisfaction by a preponderance of the evidence in the case. As to the second proposition that the plaintiff was engaged in one of the hazardous occupations defined in the Employer's Liability Act, I charge you that the plaintiff was engaged in one of the hazardous occupations defined by the said Employer's Liability Act. As to the third proposition that the accident, if any, was not caused by the negligence of the plaintiff, this fact also must be established to your mind by a preponderance of the evidence in the case.

If you find that the plaintiff was so employed by the defendant as alleged in the complaint, then when in the course of such work in a hazardous occupation as above defined, personal injury by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such employment or occupation is caused to or suffered by any workman engaged therein, in all cases in which [87] such injury of such employee shall not have been caused by the negligence of the employee injured, the employer of such employee shall be liable in damages to the employee injured.

Negligence, as applicable to a plaintiff in a case of this kind, is the doing of some act or the failure to do some act which an ordinarily prudent person under like or similar circumstances would or would not do.

You will notice that that for which the master is made liable under the Employers' Liability Act is an accident. The word "accident" as used in these instructions and as used in the act means an untoward and unforeseen and unexpected event. It arises out of and in the course of such labor, service and employment if the employee injured was actually at the time of the injury engaged in the work and labor wherein he was employed; and it was due to a condition or conditions of such occupation or employment, if such accident was incidental and due to the hazardous occupation wherein he was engaged.

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Arizona Employers' Liability Act, the law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any is proved, was caused by an accident due to the negligence of the defendant. In other words, in this case, in order to entitle the plaintiff to recover, it is not necessary that the plaintiff should prove that the defendant, United Verde Copper Co., was negligent in any manner or form. However, the employee can only recover if such accident was not caused by his own negligence.

If you find that the injury, if any, was the result [88] of an accident as hereinbefore defined and for which the plaintiff was not to blame, then you will find that the plaintiff was not negligent.

The negligence on the part of a plaintiff in order to bar a recovery must have been the proximate or producing cause of the accident.

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on the 27th day of June, 1922, the plaintiff, Joe Jaber, was in the employ of and was employed by the defendant, United Verde Copper Co., at and in its mine underground and that his duty under such employment required him to be in said mine, and in the performance of his duty under such employment, the said plaintiff, without any negligence on his part, received any personal injury as alleged

in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment, and was due to a condition or conditions of plaintiff's occupation or employment, then the Court instructs you that under those facts, if you find them to be facts, the plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

If you find from the evidence under the instructions of the Court that the plaintiff is entitled to a judgment against the defendant in any sum as damages because of personal injuries received by him, as alleged in his complaint, it then becomes your duty to fix the amount of damages to which the plaintiff is entitled; and in so doing, you will allow such damages as seem to you to be right and proper under all of the facts and circumstances in the evidence. The elements which [89] enter into fixing damages are sometimes definite and sometimes indefinite. Loss of plaintiff's employment since the injury is susceptible of proof with reasonable accuracy and in fixing the amount of damages, if any, to be allowed by you for this item, or element of damage, you must be governed by the evidence submitted in this case.

In estimating the total damage, if any, that you find the plaintiff entitled to, you have a right to consider the bodily and mental pain, both past and future, if any, and the permanent injury to health and constitution, if any, and the plaintiff's dimin-

ished capacity for labor, if any, resulting from the accident which injured him, if the evidence shows these circumstances to exist.

These elements are seldom susceptible of definite proof as to amount in money and, therefore, such amount, if any, which shall be allowed by you for any or all of such elements of damage, must be and is to be determined by you from your own general knowledge and experience and your own good sense and good judgment, based upon the evidence in this case, keeping in mind the fact that the total damages should be such sum as will compensate the plaintiff for the injuries suffered by him, if any, in the accident complained of in his complaint. Judgment in no event shall exceed the sum of money prayed for in the complaint.

You are not permitted, gentlemen, to guess or speculate as to the amount that you may find for the plaintiff, if any, if you come to that question, but the amount should be the result of your sober judgment, based upon the evidence in this case, and from such evidence and the facts proved in the case, you should figure out how much the plaintiff has already sustained in damages, if any, and how much, bearing in [90] mind his life expectancy merely as tending to show his probable length of life, not the period of time that he is able to work, but taking all of these facts and from these facts try to figure out in your sober judgment what damage the plaintiff is likely to sustain in the future by way of loss of earning power to him. In doing this, you will take into consideration such sum as

will fairly and justly compensate the plaintiff for the value of his time while he may have been disabled by reason of such injuries from the date of the injury to the trial of this case, provided you find that he was disabled during such period or any portion of it and, if so, for how long a time, and compensation for loss of time must be based only on the time lost and must not in any event exceed the amount claimed in the complaint.

You may also consider whether the injury, if any, has impaired plaintiff's earning capacity in the future, and, if so, you should allow him compensation for such impairment. You may also take into consideration his age, his condition in life, any physical pain and suffering endured by him or that you may find that he will endure in the future as the result of such injuries, if any. You may consider whether such injuries, if any, are temporary or permanent. You may also consider whether the plaintiff in the future will be able to continue the work heretofore followed by him and you will limit your consideration of the damage to the impairment of his earning capacity and to the pain and suffering which he has endured or may endure hereafter, as the evidence may indicate. In short, if you find that the plaintiff has been injured as alleged, you should award him such sum as will reasonably and fairly compensate him, not to exceed the sum prayed for in the complaint.

By a preponderance of the evidence does not necessarily [91] mean the greatest number of witnesses on one side or the other, but it means the

weight of the evidence, the degree of proof which is more convincing and persuasive to your minds, which satisfies your minds to that extent that you may act upon it as intelligent jurors.

Certain physicians have been called as expert witnesses in this case and the evidence shows that one of such witnesses was appointed by the Court at the request of the defendant to examine the plaintiff to determine his present condition. The law of the State of Arizona permits this to be done and provides that the person so requesting such appointment shall pay and compensate such physicians for their services. While a physician may be appointed by the Court under said Arizona statute to make such examination and is permitted to testify in the case as to the result of his examinations, the Court in no way vouches for the knowledge or credibility of such witness and the credibility and the weight to be given to the testimony of such witness is to be determined by you by the same rules that apply to other witnesses in the case.

I mention this fact to you at this time so that you may bear it in mind in considering the instruction which is to follow:

You, gentlemen of the jury, are the sole judges of the credibility of witnesses and of the weight to be given to their testimony. In determining the credibility of any witness, you have a right to take into consideration his manner and experience while giving his testimony, his means of knowledge of the facts to which he has testified, any interest or motive he may have, if shown, and the probability

or improbability of the truth of his statements, when considered in connection with all other evidence in the case. [92]

If you find that any witness has wilfully testified falsely to any material fact, you have a right to wholly disregard the testimony of such witness, except in so far as the same may be corroborated by other credible evidence in the case.

Two forms of verdict have been prepared for you. One, "We, the jury duly empanelled and sworn in the above-entitled action, upon our oaths do find for the defendant." In the event that the plaintiff is not entitled to recover, you will use this form of verdict. The other, "We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths do find for the plaintiff in the sum of — dollars." In the event that you find for the plaintiff, you will insert the amount of damages which you find the plaintiff entitled to recover in the blank space and use this form of verdict.

When you have retired to the jury-room, you will elect one of your number as foreman of the jury and when you have agreed upon a verdict, you will cause your foreman to sign that verdict which represents your conclusion and return it into open court.

Your verdict must be unanimous.

THEREUPON, at the close of the instruction by the Court to the jury, the defense excepted to the refusal of the Court to grant instruction No. 1 requested by defendant and exception was directed

to be noted by the Court, which instruction was as follows:

“The Court instructs the jury that under the Employer’s Liability Law the employer is liable to the employee only when the injury is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions of such occupation or employment and only when such injury shall not have been caused [93] by the negligence of the employee injured. Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness, and if you believe from the evidence in this case that the alleged concussion did not cause plaintiff’s injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease, I further charge you that even though you believe the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by an injury received while in the employment of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that accident caused his injury and the proof is not made out by showing that he was suffering from some disease. You cannot and must not permit your

sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases.”

THEREUPON the jury returned into open court their written verdict, finding in favor of the plaintiff and assessing his damages at the sum of One Thousand (\$1000.00) Dollars.

The foregoing bill of exceptions contains all of the evidence received upon the trial of this action or relating to the foregoing exceptions.

AND, WHEREAS, the matters and things above set forth do not duly appear of record, the defendant United Verde Copper Company presents its bill of exceptions in said cause, and prays that the same may be signed and sealed and made of record in this cause by this Honorable Court pursuant to the law in such cases. [94]

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

Approved:

Attorney for Plaintiff.

Order Settling Bill of Exceptions.

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose, and the same having been examined by me and found to be correct, the same is now, on this 15th day of

October, 1923, duly signed, approved and allowed, and made a part of the record herein.

F. C. JACOBS,

Judge of the United States District Court.

[Endorsed]: No. L. 128. Bill of Exceptions. Filed Oct. 5, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [95]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

The United Verde Copper Company, a corporation, incorporated under the laws of the State of Delaware, duly authorized to transact business in the State of Arizona, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered in accordance therewith on July 3, 1923, comes now by Anderson, Gale & Nilsson, its attorneys, and petitions said court for an order allowing said defendant to prosecute the writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made, and provided;

That in accordance with an order of this court dated July 20, 1923, this defendant filed a supersedeas and cost bond in the sum of Fifteen Hundred (\$1500.00) Dollars.

WHEREFORE defendant prays that an order be made that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, and that a transcript of record, proceedings and documents upon which said verdict and judgment were based, duly authenticated, be sent to said United [96] States Circuit Court of Appeals of the Ninth Circuit.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128. Petition for Writ of Error. Filed Oct. 11, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [97]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant, United Verde Copper Company, a corporation, duly incorporated under

the laws of the State of Delaware and authorized to transact business in the State of Arizona, by Anderson, Gale & Nilsson, its attorneys and in connection with its petition for a writ of error herein says that in the record and proceedings during the trial of the above-entitled cause and in said judgment in said District Court, error has intervened to its prejudice and this defendant here makes the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above-entitled cause, to wit:

(1) United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a directed verdict at the close of defendant's evidence.

(2) That the United States District Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs the jury that under the Employer's Liability Law the Employer is liable to the employee only when the injury is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions [98] of such occupation or employment and only when such injury shall not have been caused by the negligence of the employee injured. Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness, and if you believe from the evidence

in this case that the alleged concussion did not cause plaintiff's injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease, I further charge you that even though you believe the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by an injury received while in the employ of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that accident caused his injury and the proof is not made by showing that he was suffering from some disease. You cannot and must not permit your sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

(3) The verdict of the jury is contrary to law.

(4) The verdict of the jury is not supported by and is contrary to the evidence.

(5) The United States District Court of the District of Arizona erred in entering judgment upon the verdict and said judgment is contrary to the law.

(6) The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

(7) The United States District Court for the District of Arizona erred in refusing to grant the defendant a new trial. [99]

WHEREFORE said United Verde Copper Company, by reason of the errors aforesaid prays that said judgment against it, the said United Verde Copper Company, may be reversed, set aside and held for naught.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128. Assignment of Errors. Filed Oct. 11, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [100]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Stay of Execution.

Upon motion of Messrs. Anderson, Gale & Nilsson, attorneys for the defendant, and upon filing a petition for writ of error and supersedeas and cost bond in the sum of Fifteen Hundred Dollars

(\$1500.00) and Assignment of Errors, it is ordered that writ of error be and the same is hereby allowed to have reveiwed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein; and

The supersedeas and cost bond having been filed herein, it is further ordered that all proceedings herein be suspended until the determination of this writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 15th, 1923.

F. C. JACOBS,
District Judge.

[Endorsed]: No. L. 128. Order Allowing Writ of Error and Stay of Execution. Filed Oct. 15, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [101]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER CO., a Corporation,
Defendant.

Writ of Error.

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also

in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between Joe Jaber, plaintiff, and the United Verde Copper Co., a corporation, defendant, manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, to command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 16th day of October, 1923, and of the Independence of the United States the one hundred and forty-eighth.

[Seal]

C. R. McFALL,
Clerk.

By Paul Dickason,
Chief Deputy Clerk.

[Endorsed]: Filed Oct. 16, 1923. C. R. McFall,
Clerk. By M. R. Malcolm, Deputy Clerk.

Return on Writ of Error.

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within Writ of Error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]

C. R. McFALL,
Clerk U. S. District Court for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk. [102]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER CO., a Corporation,
Defendant.

Citation on Writ of Error.

The President of the United States to Joe Jaber
and Thomas P. Walton, Your Attorney,
GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Copper Co., a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the United States District Court for the District of Arizona, this 16th day of October, 1923, and of the Independence of the United States the one hundred and forty-eighth.

(Sgd.) F. C. JACOBS,

United States District Judge.

I hereby certify that I received the within writ on the 16th day of October, 1923, and personally served the same on the 23d day of October, 1923, upon Thomas P. Walton, Atty. of record for Joe Jaber, by delivering to and leaving with Thomas P. Walton, Atty. of record for Joe Jaber, said plain-

tiff named therein, personally, at Phoenix, County of Maricopa, in said District, a certified copy thereof.

G. A. MAUK,
U. S. Marshal,
By T. E. Benton,
Deputy.

[Endorsed]: Filed Oct. 25, 1923. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk. [103]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the writ of error heretofore sued out by the United Verde Copper Company and included in said transcript, the following pleadings, proceedings and papers on file, to wit:

(1) Plaintiff's amended complaint.

- (2) Defendant's demurrer and answer.
- (3) The verdict.
- (4) The judgment.
- (5) All minute entries in this cause.
- (6) Bill of exceptions.
- (7) All exhibits offered by the defendant
whether admitted or refused.
- (8) Motion for new trial.
- (9) Order extending time to prepare bill of ex-
ceptions.
- (10) Order fixing amount of supersedeas and cost
bond. [104]
- (11) Supersedeas and cost bond and approval.
- (12) Second order extending time for filing bill
of exceptions.
- (13) Petition for writ of error.
- (14) Assignment of errors.
- (15) Order allowing writ of error.
- (16) Original writ of error.
- (17) Original citation on writ of error.
- (18) This praecipe.
- (19) Clerk's certificate.

The said transcript is to be filed with the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before the 9th day of November, 1923.

ANDERSON, GALE & NILSSON,

Attorneys for Defendant. [105]

In the District Court of the United States in and
for the District of Arizona.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Joe Jaber, Plaintiff versus United Verde Copper Company, a Corporation, Defendant, said case being number Law 128—Prescott on the docket of said court.

I further certify that the foregoing 105 pages numbered from 1 to 105, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Forty-Eight and No./100 Dollars (\$48.00), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said court this 8th day of November, 1923.

[Seal]

C. R. McFALL,

Clerk of the District Court of the United States,
for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk. [106]

[Endorsed]: No. 4138. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Copper Company, a Corporation, Plaintiff in Error, vs. Joe Jaber, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed November 10, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

